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ALEXANDER L. STEVAS,
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83-624
No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

MASHPEE TRIBE, ET AL.
PETITIONERS

v.

JAMES G. WATT, ET AL.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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October 14, 1983

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Questions Presented

1. Did the First Circuit err, when, after a four-year interval and without reasoned opinion it summarily changed its original ground for dismissing Indian petitioners' first case (*Mashpee I*) from lack of standing to sue to failure on the merits, thereby precluding Indian petitioners' second case (*Mashpee II*)?

2. Did the First Circuit err, when, after the *Mashpee I* trial court expressly reserved but never reached the issue of tribal title because of standing dismissal, the Court of Appeals nevertheless expressly found title had been "fully litigated" and applied res judicata to *Mashpee II*?

3. Did the First Circuit err by holding, without explanation, that petitioners' suit against the Commonwealth of Massachusetts, which was not a party in the first action, was barred by res judicata?

4. Did the First Circuit err by holding, without explanation, that over 300 individual Indians whom the district court found were not represented in the first suit, were barred by res judicata from bringing their own suit?

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MASHPEE TRIBE, ET AL.
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v.

JAMES G. WATT, ET AL.*
RESPONDENTS

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered in this case on May 23, 1983.

Opinions Below

The opinion of the First Circuit is reported at 707 F.2d 23 (1st Cir. 1983) and is printed as Appendix A to this petition. The opinion of the United States District Court for the District of Massachusetts is reported at 542 F.Supp. 797 (D.Mass. 1982) and is printed as Appendix B to this petition.

Jurisdiction

The decision of the First Circuit was entered on May 23, 1983. By order dated August 8, 1983, Mr. Justice Brennan

* *See* Appendix C for list of parties.

extended the time for filing this petition to and including October 20, 1983. This petition was filed within the extended time. This Court has jurisdiction under 28 U.S.C. § 1254(1) and under Sup. Ct. R. 17.

Constitutional and Statutory Provisions Involved

"The Congress shall have the power . . . to regulate Commerce . . . with the Indian Tribes." U.S. Const. Art. 1, § 8, c. 3.

"No state shall enter into any treaty. . . ." U.S. Const. Art. 1, § 10, c. 1.

"He [the President] shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties. . . ." U.S. Const. Art. II, § 2, c. 2.

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, c. 2.

"No person shall . . . be deprived of life, liberty or property, without due process of law. . . ." U.S. Const. Amend. V.

"No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

Statement of the Case

This is an Indian land complaint by the Mashpee Tribe and 334 individual members of the Tribe against the United States Secretary of Interior, the local United States Attorney, various Massachusetts judicial and executive officers, a private landowner, the Commonwealth of Massachusetts and the Town of Mashpee, asking declaratory and injunctive

relief for the Tribe, its members-descendants and the Mashpee Reservation as a separate juristic person, arising out of alleged violations of the federal common law, the United States Constitution, the Nonintercourse Act (25 U.S.C. § 177) and related constitutional and statutory provisions. District Court jurisdiction was based on the Commerce and Treaty clauses of the United States Constitution; the federal common law; 5 U.S.C. § 701 et seq.; 25 U.S.C. § 177; and 28 U.S.C. §§ 1331, 1337, 1343 and 1362.

This petition seeks review of a decision of the United States Court of Appeals for the First Circuit, affirming dismissal of instant case, *Mashpee Tribe v. Watt*, 542 F.Supp. 797 (D.Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983) (*Mashpee II*), on res judicata because *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940 (D.Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (*Mashpee I*), dismissed for lack of standing, reached merits.

The gist of Mashpee petitioners' allegations is they have been a non-terminated politically recognized federal Indian tribe, living on their federally recognized Reservation in Massachusetts since at least 1789; that in 1842 and again in 1869, without federal consent, the Massachusetts legislature purportedly lifted the federal alienation restriction on the Mashpee Reservation and purportedly released the Mashpee Indians from federal guardianship, *see* Mass. Acts 1842, c.72; Mass. Acts 1869, c. 463; that in 1870, again without federal consent, the Massachusetts Legislature purportedly converted the Federal Tribe of Mashpee into the Massachusetts Town of Mashpee, purportedly transferred all the Tribe's powers and assets to said Town, including the Tribe's commons in land, funds, fishing, hunting, trapping, water, beaches, shores, wood, pasture, burial grounds and the like, *see* Mass. Acts 1870, c. 293; that said 1870 legislation also purportedly empowered the Barnstable County Probate

Court to allot or sell the Tribe's common lands; that under color of said void legislation, various state, county and local officials and various private persons have acted in derogation of said Mashpee Tribe, the said Mashpee Indian status, the said Mashpee Reservation, and the said members-descendants' commons therein; that said unauthorized actions of Massachusetts coupled with the failure of the United States to assert its trust responsibility deprives the several plaintiffs of control over their Tribe, their status, their Reservation, their commons and their property therein in violation of federal common law, the federal Constitution and federal legislation.

Reasons for Granting the Writ

I. THE FIRST CIRCUIT'S SUMMARY CHANGE OF *MASHPEE I* DISMISSAL GROUND FROM LACK OF STANDING TO SUE TO JUDGMENT ON THE MERITS, AFTER A FOUR YEAR INTERVAL, SO TO BAR *MASHPEE II*, IS A COMPLETELY UNWARRANTED DEPARTURE FROM USUAL JUDICIAL PROCEDURE.

Petitioners bring this case here because they believe the First Circuit so far departed from the usual course of judicial proceedings, as well as having sanctioned like departure by the district court, petitioners have been deprived of fundamental procedural and substantive rights. *See* Sup.Ct.R. 17.1 (a).

Instant case, *Mashpee II*, originally filed on 18 December 1981 and drawn by District Judge Skinner, is rooted in an earlier case, *Mashpee I*, originally filed on 26 August 1976 and also drawn by Judge Skinner.

In *Mashpee I*, the parties and the court having agreed "plaintiff must establish its status as an Indian tribe," 447 F.Supp. at 943, on the date of suit, "[t]he threshold issue of tribal existence was severed for separate trial by order of the court." *Id.* Having reserved "the issue of tribal title as a

matter of law decision for the court", *Id.*, with the agreement of plaintiff's counsel Judge Skinner submitted the question of tribal existence to a jury. After 40 days of trial and confused jury findings which included a finding of no tribal existence on August 26, 1976, Judge Skinner dismissed *Mashpee I* "on the merits, the plaintiff not having established its standing to bring suit as an Indian tribe". 447 F.Supp. at 950. On February 13, 1979, noting "[i]t is undisputed that if plaintiff was not a tribe in 1976 it lacked standing to sue", 592 F.2d at 579, and finding no error in Judge Skinner's jury charge, the First Circuit affirmed.

In *Mashpee II*, Judge Skinner denied petitioners' motion to recuse, and disregarding their new assertion of matter of law standing, on June 30, 1982, found that the *Mashpee I* plaintiff *did have standing*, that "the court was empowered to determine the merits", 542 F.Supp. at 800, and that the jury had found plaintiff was not a Nonintercourse Act tribe. Accordingly Judge Skinner dismissed the *Mashpee II* tribal claim on "collateral estoppel", *Id.*, and held the individual claims being derivative also failed.

On May 23, 1983, the First Circuit in a two page unreasoned, conclusory per curiam opinion, styling *Mashpee I* as "a judgment on the merits rather than a dismissal for lack of subject matter jurisdiction" because of "the tribe's inability to prove . . . its continued tribal identity" and because title "was fairly litigated" and "the interests of the tribe and its members . . . fully and fairly represented", held *Mashpee II* "barred by . . . res judicata" and "the trial court . . . not biased."

It is interesting to note that after an exhaustive analysis of *Mashpee I* in 1979, Professor Robert N. Clinton, a lawyer and nationally recognized federal Indian law expert concluded the case had been dismissed for lack of standing to sue:

> "Indeed, the court ultimately grounded its dismissal upon the tribe's lack of 'standing', i.e., capacity to sue." Clinton & Hotopp, *Judicial Enforcement of the Federal*

Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me.L.Rev. 17, 60 (1979).

And in a most significant exchange during a recusal hearing on 2 February 1982, just five months before he found there *was* standing in *Mashpee I*, District Judge Skinner agreed with petitioners' counsel that he had dismissed *Mashpee I* for lack of standing and had not reached merits:

> "MR. HAHN: In our view, the entire Mashpee trial before you was a most unusual circumstance, anyway, because it all related essentially to the question of standing —
>
> THE COURT: Right.
>
> MR. HAHN: --whether or not you could take hold of the case and go forward on the merits.
>
> THE COURT: Exactly.
>
> ***
>
> MR. HAHN: . . . Now, as far as we are concerned, the first Mashpee case truly stands for nothing except in the most limited sense there was a decision made that there was no standing in the plaintiff's 1976 case to bring their action.
>
> THE COURT: That's right." Tr. 15-16.

A. *The Decision Below Directly Conflicts With This Court's Holding That Dismissal For Lack Of Standing Is Not On The Merits and Does Not Bar A New Action With Cured Standing, In Its Hughes v. United States, Costello v. United States, Flast v. Cohen and Warth v. Seldin Decisions.*

As demonstrated above, both the *Mashpee I* District and Circuit courts explicitly dismissed *Mashpee I* at the "threshold" for lack of "standing". *See Mashpee I*, 592 F.2d at 579, 581, 589.

This Court clearly holds that a dismissal at the threshold for lack of standing terminates the action without reaching the merits:

> "*The rules of standing*, whether as aspects of the Art. III case-or-controversy requirement or as reflections of

> prudential considerations defining and limiting the role of the courts, *are threshold determinants of the propriety of judicial intervention.*" *Warth v. Seldin*, 422 U.S. 490, 518 (1975) (emphasis added).
>
> "Despite the complexities and uncertainties, some meaningful form can be given to the jurisdictional limitations placed on federal court power by the concept of standing. *The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.*" *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added).

And if the standing — or "defect of parties" — problem is cured, a second action may be brought:

> "*If the first suit was dismissed for defect of* pleadings or *parties*, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, *the judgment rendered will prove no bar to another suit.*" *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866) (emphasis added), quoted in *Smith v. McNeal*, 109 U.S. 426, 430 (1883) and *Costello v. United States*, 365 U.S. 265, 286 (1961).

See also McCarney v. Ford Motor Co., 657 F.2d 230 (8th Cir. 1981).

Inasmuch as preclusion doctrines such as res judicata and collateral estoppel come into play only when there is a final judgment "on the merits", *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955), such doctrines are wholly inapplicable in instant case.

B. *The Decisions Below Ignore The Fact That The Mashpee Tribe Is A Nonterminated, Politically Recognized Federal Tribe With Matter Of Law Standing.*

In *Mashpee I*, the "threshold" issue of tribal standing was submitted to a jury who were permitted to examine cultural and sociological existence. This procedure was fundamental error.

Standing, or a party's "right to sue", is an "issue triable to the court." *Ross v. Bernhard*, 396 U.S. 531, 539 (1970). And "[t]he question [ ]. . . whether the tribe is still existing. . . [is a] question of law." *Wilbur v. United States*, 281 U.S. 206, 221 (1930). *See also* Clinton & Hotopp, *supra*, 31 Me.L.Rev. at 56 n. 201, 59, 60. Thus tribal standing should *never* have been submitted to a jury.

Petitioners' basis for tribal standing is as follows:

Sovereign recognition of Indian tribes and their reservations can be inherited from a prior sovereign or come about by treaty or report or other official executive or legislative act of the current sovereign.

In petitioners' case, the Mashpee Tribe's federal recognition comes not only by inheritance from its prior sovereigns, the Massachusetts Commonwealth and the English Crown, but by inclusion in various tribal inventories, censuses and lists prepared and maintained by the executive and legislative departments of the United States. *See* App. D.

A leading Court of Claims case underscores the legal effect:

> "[I]f such. . . tribes. . . have not been recognized by treaty, but have been [recognized] by the officers of the Government whose duty it was to report in respect thereto, then the court will accept that as sufficient recognition of the tribe. . . on which to predicate a judgment." *Tully v. United States*, 32 Ct.Cl. 1, 7-8 (1896).

And it is well established the court is bound by such political recognition.

In international affairs, for example, once the executive or legislative — the political — departments of the United States have recognized a foreign sovereign, its courts are bound to do the same. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 301-303 (1918).

And so in Indian affairs, federal political recognition of an Indian tribe binds the courts. *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866).

And such recognition continues until expressly terminated by Congress. Clinton & Hotopp, *supra*, 31 Me.L.Rev. at 67-68 and n.262.

But not only petitioners' newly asserted matter of law basis for tribal standing and supporting documentation were not discussed by the lower courts, they were completely ignored.

II. The Decision Below Directly Conflicts With Preclusion and Finality Rules Established by this Court and Followed by Other Courts.

Discussion of res judicata (claim preclusion) and collateral estoppel (issue preclusion) is difficult in this case for two reasons.

First, because both *Mashpee I* courts structured their actions and their opinions on 'threshold' and 'standing to sue', 'preclusion' should never have been even considered let alone applied in *Mashpee II*.

And second, although the *Mashpee II* district court dismissed the tribal claim on collateral estoppel, the First Circuit, without explanation, barred all *Mashpee II* claims on res judicata.[1]

To begin with, "[t]he burden of establishing preclusion is placed on the party claiming it, . . . and reasonable doubts will be resolved against an asserted preclusion." *Schneider v. Colegio Abogados de Puerto Rico*, 546 F.Supp. 1251, 1271

[1] A second action is not precluded against those not parties (or privies of parties) in the first action. *Lawlor v. National Screen Service Corp.*, *supra*, 349 U.S. at 329. Although defendant Commonwealth of Massachusetts was not a party in *Mashpee I*, and although the Commonwealth's main bases for dismissal were lack of standing and nonjusticiability, the lower courts without discussion dismissed the Commonwealth on preclusion grounds. Dismissal of the State is stranger still in light of a subsequent First Circuit case recognizing "[r]es judicata . . . only bars actions against those parties who were involved in the earlier suit." *Roy v. City of Augusta*, 712 F.2d 1517, 1521-1522 (1st Cir. 1983).

(D.P.R. 1982); *see also Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). As this Court has stated:

> "According to Coke, an estoppel must 'be certain to every intent;' and if upon the face of the record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." *Russell v. Place*, 94 U.S., (4 Otto.) 606, 610 (1876).

In addition, it is a basic principle of Indian law that all doubts are to be resolved in favor of the Indians. *Red Bird v. United States*, 203 U.S. 76, 94 (1906).

Again, inasmuch as *Mashpee I* was dismissed at the threshold for lack of standing, there was no final judgment on the merits to support application of res judicata or collateral estoppel.

Further, in order for collateral estoppel, or issue preclusion, to apply, the issue decided in *Mashpee I* must have been "identical in all respects" to the issue presented in *Mashpee II*. *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948).

As stated, using a jury in *Mashpee I* to decide the threshold issue of tribal standing was gross legal error. By contrast, instant petitioners present the Mashpees as a non-terminated, federally recognized Tribe and back up their standing allegations with federal and state documentation never considered by either court in *Mashpee I*.

Also as stated, the *Mashpee I* trial court expressly reserved the tribal title issue (*"The issue of tribal title was reserved as a matter of law decision for the court"* 447 F.Supp. at 943), which because of dismissal for lack of standing was never reached. Nevertheless the First Circuit in *Mashpee II*, noting that title was the core issue flatly stated title *"was fairly litigated"* and applied res judicata.

Finally, instant case involves more land, additional parties and new legal theories not presented in *Mashpee I*. For example, while the *Mashpee I* plaintiff relied solely on the

Nonintercourse Act (25 U.S.C. § 177), instant petitioners base their claims primarily on the federal Indian common law as an incident of national sovereignty and as incorporated in the commerce and treaty clauses of the United States Constitution. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Cayuga Indian Nation v. Cuomo*, 565 F.Supp. 1297, 1317-1320 (N.D.N.Y. 1983).

III. The Decision Below Directly Conflicts With This Court's Policy of Permitting Relitigation Even After Merits, if the Earlier Suit's Procedures Are Questionable as to Quality, Extensiveness or Fairness, in Its *Kremer v. Chemical Const. Corp.* Decision.

Even assuming *Mashpee I* had reached merits (which petitioners of course deny), this Court will permit relitigation if the plaintiff can demonstrate serious defect in the way the earlier suit was handled:

> " 'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of the procedures followed in the prior litigation.' " *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 481, 102 S.Ct. 1883, (1982), *quoting Montana v. United States*, 440 U.S. 147, 164 n.11 (1979).

Most certainly petitioners believe *Mashpee I* was chock full of procedural defect.

For example —

This Court long ago held 'standing' and 'tribal existence' are questions of law for the court. *Ross v. Bernhard*, *supra*; *Wilbur v. United States*, *supra*. Yet this fact was entirely overlooked by the Mashpees' then chief counsel when he permitted defendants' lead counsel, an experienced trial lawyer, to lead him into submitting 'tribal existence', a law question, to a lay jury:

> "MR. ST. CLAIR: . . .The fact there was a jury on this issue is an interesting fact. My memory is very clear, there was no objection to the jury, because, as I well

> remember, we had fully briefed that question and were somewhat surprised that there was no opposition to the claim of jury." *Recusal Hearing*, CA Nos. 81-3205-S through 81-3209-S, 2 February 1982, Tr. 57.

Because Judge Skinner allowed this procedural aberration, for the first time in 200 years of federal Indian law, a non-Indian lay jury passed on 'tribal existence', a most sophisticated question of law. So this leads petitioners to question the quality of their legal representation in *Mashpee I*.[2]

Insofar as Judge Skinner is concerned, a remark he made during *Mashpee I* in the presence of certain Mashpee Indians, plagued them then and plagues them now:

> "The ramifications are very strong here. To follow the law would be too harsh on the non-Indians living in Mashpee."

Because in petitioners' view, this remark disclosed a sympathy for non-Indians and a nonsensitivity for Indians, it prompted them to aggressively seek recusal in *Mashpee II*, for petitioners believe Judge Skinner's remark raises serious question of his fairness in both Mashpee cases.

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[2] The entire *Mashpee I* procedure has been seriously questioned in *Mashpee Revisited*, American Indian Journal, November 1980, p. 19, and in Clinton & Hotopp, supra. During the *Mashpee I* trial, Judge Skinner told the jury: "[A]s you perhaps gathered, 'tribe' is a fluid word having many different meanings to many different people; and ultimately, you'll have to work with a definition that I will have to give you, a prospect I look forward to with some intrepidation [sic]." *Mashpee I* Tr. 26-72, 23 November 1977. Both during and after the trial, the parties and the District Judge questioned the relevance of all the purported "relevant times" submitted to and passed on by the jury *except* 1976. *See Mashpee I*, 447 F.Supp. at 947-948. And in upholding the lower court, the First Circuit applied the rule that a jury verdict will be upheld if there is any view of the evidence supporting it. *Mashpee I*, 592 F.2d at 590. Application of this standard led to some pretty far-reaching speculation and surmise. And if there never should have been a jury, most of the *Mashpee I* appellate opinion is surplusage anyway because most of the opinion is devoted to trying to justify what the jury said and did.

IV. The Decisions Below Directly Conflict with this Court's Policy Allowing Those Not Involved in Earlier Litigation to Bring Their Own Actions and Litigate New or Even Identical Issues, in Its *Blonder-Tongue v. University Foundation* Decision.

As petitioners pointed out to the First Circuit, the district judge stated:

> "It is not clear . . . that the plaintiff in *Mashpee* [*I*], in the sense of those individuals who controlled the prosecution of the case, represented all of the plaintiffs here." *Mashpee II*, 542 F.Supp. at 801.

The legal effect of this finding is clear:

> "Some litigants — Those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Blonder-Tongue Labs v. University Foundation*, 402 U.S. 313, 329 (1971).

Nevertheless, the First Circuit dismissed on res judicata without discussing either the trial court's finding or the *Blonder-Tongue* policy. Thus, the 334 individual Indian petitioners believe they were denied fundamental due process.

It is well-settled that the individual tribal Indian has a 'right of common' or 'right of user' in tribal assets derived from his tribe. *See United States v. Felter*, 546 F.Supp. 1002, 1022 (D.Utah 1982) and cases there cited. So *Mashpee II* petitioners sought their own declaration of tribal status as a foundation for declarations of their derivative rights. However, the lower courts refused to address any of petitioners' new bases for tribal standing.

Summary

Justice Holmes once observed, "Hard cases make bad law!" And petitioners cannot help but feel theirs is perceived as a hard case because of the unusual and summary disposition of *Mashpee II* so far. In fact a clue to First Circuit perception may lie in District Judge Skinner's observation during *Mashpee I*, "The ramifications are very strong here. To follow the law would be too harsh on the non-Indians living in Mashpee."

Yet petitioners are aware that Judges are not to be swayed by the "hardness" of a case. As Federal District Judge McCurn observed just this past May:

> "Tribal land claim litigation attracts considerable attention and apprehension among non-Indians, and not merely among those in the claim areas. This is understandable given the size and location of the claimed lands and the drastic nature of the remedy sought. Indeed, the prospect of the most drastic conceivable remedies is extremely disturbing, and has tended to pervade and disrupt the impartial determination of the issues raised on this motion to dismiss. *That it must not do.* It is the duty of the Court, at this juncture, to ascertain whether it has jurisdiction over the subject-matter and the parties, whether the claim is justiciable and timely, and whether the complaint states violation of Indian possessory rights. Those questions we must answer affirmatively. The Cayugas are therefore entitled to present evidence in support of their claim." *Cayuga Indian Nation v. Cuomo, supra,* 565 F.Supp. at 1329-1330 (emphasis added).

Petitioners are also aware they are wards of the Nation and hence of this Court, because the very weakness of their situation in so many cases has come about because of non-Indian avarice particularly as far as Indian land, fishing and hunting, timber, minerals and other tribal assets are concerned.

So petitioners believe no matter how much the non-Indian upset in Mashpee or elsewhere in Massachusetts, on well set-

tled procedural and substantive rules and policies of federal Indian law, at the very least they are entitled to the declaratory relief they seek. In fact, while their claim involves only 16,000 acres and all six Wampanoag tribal land claims in Massachusetts only total 24,000 acres, just across the border in New York, petitioners' Oneida brethren have a 6,000,000 acre claim working through the federal courts. Yet in response to a defense argument protesting the enormous potential upset of that claim, and in further contrast to Judge Skinner's attitude, Second Circuit Judge Mansfield responded:

> "Yet we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed. Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and 'disruptive' remedies. [citing cases]." *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1083 (2nd Cir. 1982).

The simple fact is, despite the First Circuit's unsupported assertion that *title was fully litigated*, this core issue has never been reached, let alone litigated. Yet oddly enough, just 10 months after deciding *Mashpee I*, the First Circuit noted in a later Massachusetts Indian land claim:

> "The next year, 1789, the United States was formed and Massachusetts' sovereignty over the Indian lands ended." *Epps v. Andrus*, 611 F.2d 915, 916 (1st Cir. 1979), *citing Oneida Indian Nation v. County of Oneida*, *supra*, 414 U.S. 661.

So in that sense, were Mashpee tribal title ever litigated, by having admitted the United States has held sovereign title to the Mashpee Reservation, subject to the Mashpees' possessory rights, since 1789, the First Circuit has not only decided the tribal title issue correctly but in the Mashpees' favor.

But in their companion petition for certiorari, petitioners' Gay Head brethren challenge the First Circuit's recent asser-

tion of Massachusetts' right to extinguish Indian possessory title to Indian land within its borders through its general police powers and pre-Union fee title. And of course this proposition goes not only to the heart of the Gay Headers' claims but to the heart of all six Massachusetts Indian land claims including instant petitioners' claims.

In any event, petitioners feel no matter how hard their case, neither the First Circuit nor Judge Skinner are warranted in changing the rules after the game is played to defeat the Indians' claims no matter how. This Court has demonstrated time and again hard cases provide opportunities to show the integrity of our law. As Justice Black put it, "Great nations, like great men, should keep their word." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960).

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the First Circuit's decision.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 82-1562

MASHPEE TRIBE, ET AL.
PLAINTIFFS-APPELLANTS

v.

JAMES G. WATT, ET AL.
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before
BOWNES and BREYER, *Circuit Judges*,
and CAFFREY,* *District Judge*.

Robert C. Hahn, with whom *William A. Hahn*, and *Hahn & Matkov* were on brief, for appellants.

James D. St. Clair, P.C., with whom *William F. Lee*, and *David H. Erichsen, Donald R. Frederico, Hale and Dorr*, and *Morris Kirsner* were on brief, for appellee Town of Mashpee.

Thomas R. Kiley, Assistant Attorney General, with whom *Francis X. Bellotti*, Attorney General, *Paul R. Matthews*, Assistant Attorney General, were on brief, for appellee Commonwealth of Massachusetts.

May 23, 1983

* Of the District of Massachusetts, sitting by designation.

Per Curiam. We have examined the record in this case and the prior case, *Mashpee Tribe v. Town of Mashpee*, 447 F.Supp. 940, 950 (D.Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), with care, and we have reached three conclusions. First, the decision in the prior case rested on the tribe's inability to prove an essential element of its substantive claim, its continued tribal identity; the dismissal order therefore was a judgment on the merits rather than a dismissal for lack of subject matter jurisdiction. Second, all claims in this case are either the same as, or logically dependent upon, the basic claim presented in the first case — namely, whether the Mashpee Tribe is legally entitled to its "tribal land" in and around Mashpee, Massachusetts. *See generally Epps v. Andrus*, 611 F.2d 915 (1st Cir. 1979); *Shulthis v. McDougal*, 170 F. 529, 533 (8th Cir. 1909), *appeal dismissed*, 225 U.S. 561 (1912); *United States v. Felter*, 546 F.Supp. 1002, 1022 (D. Utah 1982); F. Cohen, *Handbook of Federal Indian Law* 605-11 (1982 ed.). Third, this claim was fairly litigated in the first suit, and the interests of the tribe and its members were fully and fairly represented. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940); *Nathan v. Rowan*, 651 F.2d 1223 (6th Cir. 1981); *Haas v. Howard*, 597 F.2d 654, 657 n.2 (1st Cir. 1978).

Under these circumstances, this effort to relitigate the tribe's claim is barred by elementary principles of res judicata. *See Restatement (Second) of Judgments* §§ 19, 24-25, 41 (1982); 3 Bracton, *On the Laws and Customs of England* 351-52 (S. Thorne trans. 1977) (circa 1250). The addition of other defendants and parcels of land does not change the result, for title to all Mashpee land is what was, and what remains, at stake. *See Mendez v. Bowie*, 118 F.2d 435, 440 (1st Cir.), *cert. denied sub nom. Rios v. Bowie*, 314 U.S. 639 (1941); *Mertes v. Mertes*, 350 F.Supp. 472 (D. Del. 1972), *aff'd by order*, 411 U.S. 961 (1973); *Restatement (Second) of*

Judgments §§ 25, 43 comment c (1982). Indian land claims are not entitled to a special exemption from these principles. *See Arizona v. California*, 51 U.S.L.W. 4325, 4331 (U.S. Mar. 30, 1983) (dictum); *Heckman v. United States*, 224 U.S. 413, 445-46 (1912). Our examination of the trial record confirms our previous conclusion that the trial court was not biased; we deny the plaintiffs' second motion to disqualify the trial judge, as well as all remaining motions.

The judgment of the district court is affirmed. The petition for mandamus and all other motions are denied.

Adm. Office, U.S. Courts — Addison C. Getchell & Son, Inc.

APPENDIX B

United States District Court
District of Massachusetts

CIVIL ACTION
No. 81-3205-S

MASHPEE TRIBE, ET AL.,
PLAINTIFFS,

v.

JAMES G. WATT, ET AL.,
DEFENDANTS

MEMORANDUM AND ORDER

June 30, 1982

SKINNER, D.J.

Plaintiffs, on their own behalf and on behalf of the Mashpee tribe, bring this action to recover tribal lands allegedly conveyed by their ancestors in violation of the Constitution and federal statutes.[1] They allege that the United States Government, in failing to approve or prevent the conveyances, violated its trust responsibility to the Mashpee Indians, thereby depriving the plaintiffs of their property and the equal protection of the laws in violation of the Fifth Amendment. Plaintiffs also allege that the Commonwealth of Massachusetts, by authorizing the sales,[2] as well as the Town of Mashpee and certain county and local officials, by validating the sales, violated their rights under the Constitution, the In-

[1] For a detailed discussion of the history of these transactions, *see, Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 943-947 (D. MA. 1978).

[2] Allegedly by the passage of two statutes: (1) ch. 463, Acts of 1869, and (2) ch. 293, Acts of 1870.

dian Nonintercourse Act, 25 U.S.C. § 177 ("Nonintercourse Act"), and several other federal statutes. They seek declaratory and injunctive relief and damages.

Defendants Town of Mashpee, William C. Nye, John J. Bowes and Stephen Weekes, and the Commonwealth of Massachusetts have moved to dismiss plaintiffs' complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons which follow, defendants' motions are allowed.

1. *Res Judicata.*

Defendants' first ground for dismissal is that plaintiffs' claims are barred by the judgment in *Mashpee Tribe v. Town of Mashpee,* 447 F. Supp. 940 (D. MA. 1978), *aff'd sub nom., Mashpee Tribe v. New Seabury Corp.,* 592 F.2d 575 (1st Cir.), *cert. denied,* 444 U.S. 866 (1979) ("*Mashpee I*"). That suit was brought by the "Mashpee Tribe" of Indians against the owners of allegedly tribal land located in the Town of Mashpee. The alleged tribe sought recovery of that land on the ground that it had been purchased in violation of the Nonintercourse Act. *Id.* at 943. The only question reached was whether the plaintiff constituted a tribe entitled to the protections of the Act. *Id.* After 40 days of trial, the jury found that plaintiff was not such a tribe. *Id.* Accordingly, the case was purportedly "dismissed on the merits," because the plaintiff had "not . . . established its standing to bring suit as an Indian tribe." *Id.* at 950. After the jury returned its verdict, the plaintiff was given an opportunity to amend its complaint to state the claims of its individual members, but it chose not to do so. *Mashpee I,* Transcript, pp. 2-3 (January 26, 1978).

The instant suit is substantially the same as *Mashpee I.* The plaintiffs allege that they are members of the Mashpee Tribe, the same entity involved in *Mashpee I.* Many, but not all, of

the individual plaintiffs here took an active role in *Mashpee I*, helping to plan the strategy of the case and testifying at trial or in depositions. Some of the defendants named in this case are different from those in *Mashpee I*, but the same land is at issue and the same transactions are challenged. In addition, the same general relief is sought; return of the land to the plaintiffs. Defendants maintain that these similarities require that the instant case be barred by *res judicata*.

A. *Tribal claims.*

Plaintiffs' claims on behalf of the "Mashpee Tribe" are clearly barred by the decision in *Mashpee I*. Plaintiff there was given a full and fair opportunity to litigate the issue of tribal existence and it was an issue necessary to the outcome of the action. Since the jury held that the "Mashpee Tribe" did not exist at the relevant times, plaintiffs here are collaterally estopped from proceeding on behalf of the alleged tribe. *See, Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979).

B. *Individual claims.*

Defendants also contend that plaintiffs' individual claims are barred. They maintain that *Mashpee I* was dismissed on the merits; that plaintiffs here were in privity with the plaintiff in *Mashpee I*; and that therefore plaintiffs are precluded "from relitigating issues that were or could have been raised in that action." *Federated Department Stores v. Moitie,* 452 U.S. 394, 398 (1981), including any individual claims.

Plaintiffs respond by arguing that *Mashpee I* was not a final judgment on the merits because the only issue addressed was that of standing. Since the jury found that no tribe existed, the alleged tribe had no standing to sue, and the court had no jurisdiction to reach the merits. As a result, plaintiffs contend that *Mashpee I* is no bar to the instant suit.

In order to analyze the standing question, the identity of the "tribe" recognized by and suing on behalf of its individual

members in *Mashpee I* has to be separated from the issue of whether that group constituted a "tribe" entitled to the protections of the Nonintercourse Act. The issue of standing focuses on the characteristics of the party bringing the suit and not upon the issues raised in the complaint. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Whether a plaintiff has a legal interest entitled to protection goes to the merits, not to the question of standing. *Data Processing Service v. Camp*, 397 U.S. 150, 153 (1969).

In this case, the group which brought *Mashpee I* possessed the necessary characteristics to establish its standing to sue. It had "Article III" standing because: (1) the group "suffered some actual . . . injury" (loss of land); (2) "as a result of the putatively illegal conduct of the defendant[s]" (authorization and consummation of land purchases without federal permission); and (3) the injury is "redressable by the court" (divestiture of the land or similar relief). *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 50 USLW 4103, 4105 (Jan. 12. 1982). The alleged tribe also fell within the court-imposed "prudential" limits on standing because: (1) it was "assert[ing] [its] own legal rights" (to the "tribal" land); (2) it was not asking the court to adjudge "abstract questions of wide public significance" or "generalized grievances;" and (3) its complaint fell within "the zone of interests to be protected . . . by the statute . . . in question" (the Nonintercourse Act). *Id.* at 4106.

Because the plaintiff in *Mashpee I* had standing, and no other jurisdictional barriers were raised, the court was empowered to determine the merits of the claim. It was at this point that the issue of tribal status under the Nonintercourse Act arose. Since the jury found that the plaintiff was not a "tribe" under the Act, the case was dismissed.

Under Fed.R.Civ.P. 41(b), that dismissal operated "as an adjudication on the merits" unless it was "for lack of jurisdic-

tion". "Lack of jurisdiction" within the meaning of the rule covers "plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim," *Costello v. United States*, 365 U.S. 265, 285 (1961). These are technical preconditions to access to the court, not elements of the substantive claim, and are typically curable. *See*, e.g., *Costello, supra*, *Eaton v. Weaver*, 582 F.2d 1250, 1256 (10th Cir., 1978); *Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 525 (5th Cir., 1980); *Smith v. Pittsburgh Gage and Supply Co.*, 464 F.2d 870 (3rd Cir., 1972).

Mashpee I was clearly not a case in that category and does not fall within the exception to the adjudication on the merits in Rule 41(b). Accordingly, I conclude that the judgment of dismissal in *Mashpee I* was a judgment on the merits. *Cf. Weston Funding Corporation v. Lafayette Towers, Inc.*, 550 F.2d 710 (2nd Cir., 1977).

The issue is whether the individual members of the Mashpee Tribe are now barred from bringing a suit in their own behalf. Where the plaintiff in a second suit was in privity with or in control of the plaintiff in the first suit, *res judicata* bars either one from relitigating all issues that were or could have been raised in the initial action. *See, generally*, 1B Moore's ¶0.411[1] at 1251-1254, *Federated Dept. Stores*, 452 U.S. at 398.

Under generalized notions of privity, plaintiffs could be bound on the theory that even though the Mashpee Tribe was not recognized under the Nonintercourse Act, it was an organization which effectively represented the interests of its individual members. *See, Lawlor v. National Screen Service*, 349 U.S. 322, 329 n.19 (1955) (privies are "those whose interests are represented by a party to the action"), *General Foods v. Mass. Dept. of Public Health*, 648 F.2d 784, 787 (1st

Cir., 1981) ("a person who is not a party to an action but who expressly or impliedly gives a party authority to represent him may be bound by the rule of *res judicata* as though he were a party"), *Acree v. Airline Pilots Association*, 390 F.2d 199, 202-203 (5th Cir., 1968), *cert. denied*, 393 U.S. 852 (1976) (class action by airlines pilots is barred where their individual claims were effectively raised in an earlier suit by their union). It is not clear, however, that the plaintiff in *Mashpee*, in the sense of those individuals who controlled the prosecution of the case, represented all of the plaintiffs here.

Furthermore, even if the technical requirements of *res judicata* have been met, its application may be stayed for competing reasons of public policy or fairness. *See*, 1B Moore's 0.405[11]-[12] at 783-791. In *Brown v. Felsen*, 442 U.S. 127 (1979), the Supreme Court noted that:

> Because *res judicata* may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth. For the sake of repose, *res judicata* shields the fraud and the cheat as well as the honest person. It is therefore invoked only after careful inquiry.

Brown v. Felsen, 442 U.S. at 132. And, in *Blonder-Tongue v. University Foundation*, 402 U.S. 313 (1971), the Court noted that:

> Both orderliness and reasonable time saving . . . require that [res judicata be applied] unless some overriding consideration of fairness to a litigant dictates a different result in the circumstances of a particular case.

Blonder-Tongue, 402 U.S. 324-325.

Considerations of public policy and fairness have led courts to stay the application of *res judicata* in a number of different

situations, e.g., (1) where "neither the interests served by *res judicata*, the process of orderly adjudication in state courts, nor the policies of the Bankruptcy Act would be well served" by precluding the petitioner from presenting evidence beyond the earlier judgment in a later suit to determine whether a debt previously reduced to judgment is dischargeable under the Act, *Brown*, 442 U.S. at 133; (2) where the public's interest in giving close scrutiny to fee arrangements between attorney and client outweighs the policies behind *res judicata* and collateral estoppel, *Spilker v. Hankin*, 188 F.2d 35 (D.C. Cir., 1951); (3) where the public policy against monopolization prevents a patentee from conclusively establishing the validity of a patent for the purpose of obtaining injunctive relief, *Lawlor*, 349 U.S. at 326-329; (4) where giving strict *res judicata* effect to state administrative decisions would undermine considerations of federal preemption, *Town of Springfield, Vt. v. State*, 521 F. Supp. 243, 246 (D. Vt., 1981); and (5) where application of *res judicata* would enable employers to immunize themselves against enforcement of OSHA standards, a result contrary to the policies of the Act, *International Harvester Co. v. Occupational Safety and Health Review Commission*, 628 F.2d 982, 986 (7th Cir., 1980).

This action involves the rights of American Indians, a subject of special concern to the federal government. As one court has recently noted:

> It is federal policy, undeniable, if belated, that the Indian has a special status in our Country and that he is justly entitled to very special protection.

Red Fox v. Red Fox, 564 F.2d 361, 365 (9th Cir., 1977), *quoting*, *Aqua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1188 (9th Cir., 1971) (Ely, J., dissenting), *cert. denied*, 405 U.S. 933 (1972). That special con-

cern may provide the basis for staying the effect of *res judicata* in particular cases. *See, id.*

The instant suit also presents, for the first time, the claims of the individual descendants of the Mashpee Tribe. It raises an issue under the Nonintercourse Act which has not been fully addressed by any court, an issue which will also be raised in several related cases now pending before me.[3]

Because the case involves the rights of American Indians and raises unresolved issues with regard to those rights, the strict application of *res judicata* to bar plaintiffs' individual claims should not be applied as a matter of public policy even though it might be otherwise applicable.[4] Accordingly, while plaintiffs' tribal claims are barred for the reasons stated previously, I will consider the legal merits of plaintiffs' individual claims.

2. *Plaintiffs' Individual Claims.*

A. *Nonintercourse Act.*

Plaintiffs allege that the state and local defendants violated the Nonintercourse Act, 25 U.S.C. § 177, by authorizing the

[3] *Christiantown Tribe, et al. v. Watt, et al.*, Civ. No. 81-3206-S; *Chappaquidick Tribe, et al. v. Watt, et al.*, Civ. No. 81-3207-S; *Herring Pond Tribe, et al. v. Watt, et al.*, Civ. No. 81-3208-S; *Troy Tribe, et al. v. Watt, et al.*, Civ. No. 81-3209-S.

[4] I am aware that the Supreme Court, in a recent case, *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 403 (1981) has cast a pall upon the "flexible" application of *res judicata*. I do not think that that case requires a different result here, however. First, the court did not expressly overrule other recent cases such as *Brown*, 442 U.S. 127 (1979), which had reaffirmed the flexibility of *res judicata* in certain cases. Second, *Federated Dept. Stores* involved the *res judicata* effect of a failure to appeal, a circumstance more directly implicating the public policy in favor of repose.

sale of their ancestral land without federal approval.[5] They maintain that even though they do not constitute a tribe under the Act, nor were they such a tribe at the time the challenged conveyances were made, *see, Mashpee I,* they are still entitled to the protections of the Act because of their status as individual Indians. Defendants contend that only sales of tribally held land, not land owned by individual Indians, are covered by the Act and that therefore only tribes can state a cause of action under its provisions.

Several cases have stated that while land transactions by individual Indians were subject to the restrictions of the Nonintercourse Act in its early versions,[6] that coverage was eliminated with the passage of the 1834 Act.[7] *See, Epps v. Andrus,* 611 F.2d 915, 917 (1st Cir., 1979), *Narrangansett Tribe*

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[5] The Nonintercourse Act provides:

> No purchase, grant, lease or other conveyance of lands,... from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177.

[6] The first of the Nonintercourse Acts was enacted in 1790, Act of July 22, 1790, ch. 33, 1 Stat. 137 ("1790 Act"). Section 4 provided that: "no sale of lands made by any *Indians*, or any nation or tribe of Indians, shall be valid ..., unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." (emphasis added). That provision was reenacted in 1793, Act of March 1, 1793, ch. 19, 1 Stat. 329; 1796, Act of May 19, 1796, ch. 30, 1 Stat. 469; 1799, Act of March 3, 1799, ch. 46, 1 Stat. 743; and in 1802, Act of March 30, 1802, ch. 13, 2 Stat. 139 ("the 1802 Act"). Section 12 of the 1802 Act stated that: "no purchase, grant, lease, or other conveyance of lands, ..., from any *Indian*, or nation, or tribe of Indians" without federal approval was invalid. (emphasis added).

[7] In section 12 of the Act of June 30, 1834, ch. 161, 4 Stat. 729 ("the 1834 Act"), the reference to "any Indian" in the 1802 Act was eliminated, and the restriction on alienation of Indian land was enacted in substantially the form of 25 U.S.C. § 177.

v. Southern Rhode Island Land Dev. Corp., 418 F. Supp. 798, 808-809 (D. R.I., 1976), *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 627 (2nd Cir., 1980), *cert. denied*, 452 U.S. 968 (1981), *see, generally*, Dwyer, *Land Claims Under the Indian Nonintercourse Act: 25 U.S.C. § 177*, 7 B.C. Env. Affs. L. Rev. 259, 271 (1979). Accordingly, it has been held that individual Indians may not state a claim under the Nonintercourse Act. *See, Epps*, 611 F.2d at 917-918.

These cases, however, did not consider the effect of § 29 of the 1834 Act on the continued existence of whatever individual rights there were under the previous Nonintercourse Act. Section 29 was a "saving clause". "[T]he Nonintercourse statute contained in the 1802 Act remained applicable by virtue of § 29 of the 1834 Act to the tribes east of the Mississippi." *Mohegan*, 638 F.2d at 626; *see also*, Note, *Land Claims Under the Indian Trade and Intercourse Acts: The White Settlement Exception Defense*, 60 B.U. L. Rev. 911 (1980). *Mohegan* held that § 29 continued the applicability of the "white settlements exception" of the 1802 Act to the eastern tribes, even after its elimination in the 1834 Act. 638 F.2d at 626-628. Plaintiffs argue that § 29 also preserved the language "from any Indian" in the 1834 Act and thereby established the basis for their cause of action.

Defendants assert to the contrary that the language of section 29, that the repeal of the 1802 Act by the 1834 Act "shall not . . . impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi . . .", saves only tribal rights. The language may also be read, however, to mean that with respect to tribes east of the Mississippi, the rights of individual Indians would be preserved. This ambiguity requires me to explore the intent of Congress, never clear at best, now shrouded by a "veil of time" nearly two centuries thick.

The major purpose of the Nonintercourse Act was to prevent Indian uprisings and preserve the peace along the frontier. *Mohegan*, 638 F.2d at 621. This was to be accomplished two ways. One was by "protect[ing] the rights of Indians to their properties", *Wilson v. Omaha Indian Tribes*, 422 U.S. 653 (1979), by acknowledging and guaranteeing the Indian tribes' right to occupy their aboriginal lands ("aboriginal title"). *See Narragansett*, 418 F. Supp. at 803. The other was by preventing the Indians from "improvidently disposing of their lands" at fraudulently low prices. *Id.*, *see generally*, Note, *supra*, 60 B.U. L. Rev. at 918-919. This purpose would in no way be served by restricting the alienation of property acquired by Indians from non-Indians in settled sections of the country. It seems clear, therefore, that the Nonintercourse Acts imposed restrictions only on the alienation of land held under aboriginal title.

Aboriginal title, however, was always tribal, and held in common by the members of the tribe. Individual use and occupancy might be granted by consent, and indeed might be extended to one family or network of families from generation to generation, but such right of use and occupancy was not transferable, and title at all times remained in the tribe. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 665 (1979); *Joint Tribal Council of Passamaquoddy Tribes v. Morton*, 528 F.2d 370, 376 n.6 (1st Cir., 1975). As one recent commentator observed:

> Although the Act makes reference to individual Indians, the justification for allowing only Indian tribes to assert claims under the Act is warranted. This justification rests on the nature of the relationship between an individual Indian and his rights to tribal land. Indian land belonged to the tribe as a community, and the right of each

> individual to participate in the enjoyment of such property depended on tribal membership. This right was neither alienable nor descendable, and it did not entitle an individual to a pro rata proportion of the proceeds of any sales of the land made by the tribe. Thus the fact that no individual Indian can assert a cause of action under the Act is consistent with his rights to tribal land.

Comments, *Indian Land Claims under the Nonintercourse Act*, 44 Albany L. Rev. 110, 122 (1979).

The above description was in fact applicable to the Mashpee Indian community until 1842. *Mashpee I*, 447 F. Supp. at 946; Hutchins, *Mashpee, The Story of Cape Cod's Indian Town*, Amarta Press, 1979, pp. 118-119. In 1842, the General Court of Massachusetts granted to the Indian Proprietors of Mashpee a limited title to up to 60 acres of previously allotted common land of the proprietorship. This title was in all respects the equivalent of fee simple title except that the land could not be alienated to anyone except another Mashpee proprietor. *Id.* In 1869, the General Court released this restriction on alienation. By this time, some of the proprietors had sold their property to other proprietors, some of whom had acquired very large tracts of land.

Thus some Mashpee Indians did acquire individual title to land which had been held in aboriginal Indian title. Did Congress intend such land to be covered by the Nonintercourse Act of 1802?

Congress did in fact go through the same allotment process with other Indian tribes as the General Court of Massachusetts had with Mashpee, and in many of these cases had restricted the rights of individual Indians to alienate these holdings without the approval of the federal government. Such approval was provided for by administrative action, however, and not by "treaty or convention" approved by

Congress, and the restriction was limited in time to 21 or 25 years. Cohen, *Handbook of Federal Indian Law*, U.S. Government Printing Office, 1943, pp. 108-109, 206, 221-227.

While it thus appears that restriction of alienation on individual Indian lands for various periods of time was a policy of Congress as expressed in divers acts and treaties affecting Indian tribes, it does not follow that such an intent was expressed in the Nonintercourse Act for the following reasons:

First, the language "any Indians, or nation or tribe of Indians" was carried over into the 1802 Act through a succession of intervening statutes, from the first Nonintercourse Act, which was enacted July 22, 1790, 1 Stat. 137. It is unlikely that Congress was contemplating the sale of individual Indian allotments at this time. In 1790, the President and Congress were concerned with peace on the frontier and preventing the nation's relationship with large and powerful Indian tribes from dangerous deterioration as a result of the depredations of unscrupulous non-Indian settlers. It is not likely that they were troubled by rare sales of land held by individual Indians.[8]

Second, the scheme of regulations of allotted lands was tailored to dealings with individuals; e.g., permission to sell or mortgage was granted administratively; the restraint was limited in time and could be lifted if the Indian administrator was satisfied that the individual owner was capable of handling his own affairs. Cohen, *supra*, 109. Under the Nonintercourse Acts, the restraint on alienation could be released only by treaty or convention. Treaties and conventions are made by the President with the consent of the Senate. The terms are ordinarily applied to arrangement between sovereign

[8] For a general discussion of the purposes of the Act, *see*, F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834 (1962).

powers, including Indian tribes. *See, Edye v. Robertson,* 112 U.S. 580, 598 (1884); *United States v. Wheeler,* 435 U.S. 313, 322-323 (1978). It seems highly unlikely that Congress intended to crank up the whole cumbersome treaty power of the United States every time an individual Indian undertook to mortgage or sell his section of allotted land. "Treaty or convention" is wholly inappropriate language to describe a nation's dealing with an individual.

What, then, is the meaning of "any Indian" in the phrase "any Indian, or nation, or tribe of Indians"? One commentator has suggested that "any Indian" was included to cover the common situation where rights to tribal land were granted by deed of a chief or of head men as representatives of the tribe. Note, *supra,* 60 B.U. L. Rev. 928. Such deeds figure prominently in Mashpee history, e.g., the grants by Paupmunnuck to Myles Standish and of Weepquish, Tookonchasun, and later Quachatasset to the Mashpee proprietors. Hutchins, *supra,* pp. 26, 47-51. This reading also provides an explanation for the dropping of the phrase without debate or comment in the 1834 Act: it was redundant.

It is noteworthy, although not conclusive, that even the 1802 Act did not include the phrase "any Indian" in that part of section 12 which provided punishment for negotiating the sale of Indian lands:

> . . .: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with *any such Indian nation, or tribe of Indians,* for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: . . . (emphasis supplied).

If the savings clause was not for the purpose of preserving a restriction on the alienation of individual Indian title, what

was its function? In *Mohegan, supra*, the Court of Appeals for the Second Circuit held that it preserved the "white settlement" exception with respect to eastern Indians. Since the trading provisions of the 1834 Nonintercourse Act applied only to "Indian Country",[9] however, the need to preserve that exception is far from clear. The most satisfactory explanation is that opponents of the administration's Indian policy, led by Senator Freylinghuysen of New Jersey, were concerned that the emphasis in the 1834 Act on "Indian Country", and the federal policy of forced relocation westward of the Indians, would leave tribes and remnants of tribes east of the Mississippi without federal protection.[10] *See*, Sen. Freylinghuysen, *Speech Delivered in the Senate of the United States*, Gales & Seaton's Register of Debates in Congress, Vol. 6, 21st Cong., 1st Sess., Friday, April 9, 1830, pp. 309-322. Section 29 of the 1834 Act, "the saving clause", was added to the Act by an amendment offered by Senator Freylinghuysen. *See*, H.R. Rep. No. 474, 23rd Cong., 1st Sess. 83; Congressional Debates, Vol. 10, part 4, 23rd Cong. (1833-1834) at 2125.

Accordingly, I conclude that section 29 of the Nonintercourse Act of 1834 did not preserve any federal restriction on

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[9] Section 1 of the 1834 Act defined "Indian Country" as

> all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished.

This definition has been interpreted to include any land, not within the borders of a state east of the Mississippi and to which Indian title has not been extinguished. *See, Bates v. Clark*, 95 U.S. 204, 207-208 (1877), *Mohegan*, 638 F.2d at 618.

[10] This interpretation of section 29 does not require, and I do not hold, that the provisions of the 1834 Act, in fact, only applied in "Indian Country". *Compare, Mohegan*, 638 F.2d at 626, and *Mohegan*, 452 U.S. 968, Rehnquist, J. (dissenting).

the alienation of land held by individual Indians because no such restriction existed in the 1802 Act.

I realize that dicta in *Epps v. Andrus, supra*, 611 F.2d at 917, *Narrangansett Tribe, supra*, 418 F. Supp. 808-809 and, in my own opinion, in *Mashpee I*, 447 F. Supp. at 950, suggest that there was such a federal restriction. This conclusion was not necessary to the result in any of those cases, and at least in *Mashpee I*, the issue was not explored. In my opinion, these dicta are incorrect.

The ultimate conclusion in *Epps v. Andrus*, however, that only Indian tribes or nations of Indians may invoke the protection of the Nonintercourse Act is correct for the reasons stated above. The issue of tribal status having been resolved against the plaintiffs in *Mashpee I*, their claims as individuals under the Nonintercourse Acts must be dismissed.

B. *Other Claims.*

In addition to their claims under the Nonintercourse Act, plaintiffs allege violations of several constitutional and statutory provisions:

(1) Plaintiffs allege that the Commonwealth's and the town's actions in authorizing the sale of their ancestral lands violated the Commerce Clause, U.S. Constitution, Article I, § 8, cl. 3. The Commerce Clause provides that Congress shall have the power to "regulate commerce . . . with the Indian Tribes". *Id.* It has been held to apply two limitations on the states' authority to regulate Indian affairs. One is federal preemption. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). Since there is no federal statute which protects plaintiffs here, preemption is not applicable. The other limitation is based on inherent Indian sovereignty. *See, id.;* Laurence, *The Indian Commerce Clause*, 23 Ariz. L.

Rev. 203, 242 (1981). To the extent this limitation is available, however, it applies to state interference with tribal self-government. *Id.* Since plaintiffs do not constitute a tribe, it too is inapplicable.

(2) Plaintiffs also allege that the state defendants' actions violated the Supremacy Clause, U.S. Constitution, Article IV, cl. 2. The Supremacy Clause does not support direct causes of action, however. It only gives priority to federal rights created by a federal statute when they conflict with state law. *See, Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979). Since plaintiffs have not shown the acts of the state to be in conflict with any federal laws affecting them as individuals, the Supremacy Clause does not apply.

(3) Plaintiffs allege that all the defendants violated their rights under the due process and equal protection guarantees of the Constitution by failing to accord them their rights secured by the Nonintercourse Act. Since I have already held that they are not protected by the Act, these claims must fall as well.

(4) A similar result is reached for plaintiffs' claims under 42 U.S.C. § 1983, 25 U.S.C. § 1322(b), and 28 U.S.C. § 1360 (b).[11] Since plaintiffs have shown no violation of federal law and no trust relationship or other restriction upon the alienation of the claimed land, they have no cause of action under these statutes.

(5) Nor have plaintiffs stated claims under the National Environmental Policy Act, 42 U.S.C. §§ 4331-4335, or the laws governing the conservation of historic sites and archeo-

[11] Sections 25 U.S.C. 1322(b) and 28 U.S.C. 1360(b) both provide that:

> Nothing in this section shall authorize the alienation ... of any real ... property ... belonging to any Indian ... that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States...

logical resources, 16 U.S.C. §§ 461-470n, 470aa-47011. These statutes do not provide for any causes of action applicable to the actions challenged by plaintiffs.

Since plaintiffs have failed to state any claim upon which relief may be granted, defendants' motions must be ALLOWED as to all counts. Accordingly, plaintiffs' complaint is DISMISSED with respect to defendants' Town of Mashpee, William C. Nye, John J. Bowes, Stephen Weekes, and the Commonwealth of Massachusetts.

[SIGNED]

United States District Judge

Appendix C

List of Parties

MASHPEE TRIBE and MASHPEE INDIAN RESERVATION and EARL H. MILLS, SR., CHIEF, ELLSWORTH OAKLEY, DELSCENA HENDRICKS, JOHN A. PETERS, RUSSELL M. PETERS, AMELIA G. BINGHAM, WILLIAM PETERS, JOHN PETERS, JR., MAY L. LOPES, EARL H. MILLS, JR., GKISEDTANAMOOGK, DAISY MOORE, ANITA NIELSEN, CLINTON ATTAQUIN HAYNES, JOHN NEWCOMB, JOHN MENDES, CAROL LOPEZ, LEO G. PETERS, EDGAR F. TOBEY, SR., FREDERICK POCKNETT, CLARENCE MORAN, VIRGINIA MORAN, OLIVER POCKNETT, LAURA MENDES, LYDIA STANLEY, MICHELE TURPIN, JOAN AVANT TAVARES, WALTER M. FRYE, HERBERT NOYES, NORMAN DIAS, ROXANNE MILLS-BROWN, PAULA D. PETERS, LAWRENCE S. TOBEY, SR., LAWRENCE S. TOBEY, JR., GEORGE T. TOBEY, NATHANIEL J. TOBEY, MALCOLM G. TOBEY, MALCOLM TOBEY, JR., EARL N. CASH, LEONA A. WHITE, SOPHIA E. LOPES, RHODA M. FERNANDEZ, SILAS A. NEWCOMB, JR., GERTRUDE AIKENS, PHILIP ALMEIDA, ERIC ALMEIDA, VICTOR ALMEIDA, SANDRA ALVES, SHIRLEY PELLS BULLOCK, CLARENCE BULLOCK, RENEE HENDRICKS BANKS, MILDRED BLACK, OGDEN BLACK, MARLENE E. BLACK, CAROL S. BROWN, FREDERICK V. BROWN, BETTY BICKFORD, DOROTHY CASH, EARL N. CASH, JR., BERNARD COOMBS, ANITA COOMBS,

CINDY COSTA, NATALIE COSTA, ANEBA COSTA, VICKIE COSTA, DENISE COSTA, LINDA COSTA, JUANITA COSTA, MARGARET L. COSTA, JOHN OAKLEY, IRVING OAKLEY, MINNIE L. DEGRASSE, CHRISTINE OAKLEY FLOYD, MARSHA HELME, SHIRLEY HELME, MARJORIE DUARTE, TARLTON A. EDWARDS, RITA GONSALVES, PETER GONSALVES III, DION WESLEY FLOYD, RICHARD FLOYD, LINCOLN HENDRICKS, MYRON HENDRICKS, TEDDY W. HENDRICKS, WINONA HENDRICKS, CURTIS L. HENDRICKS, DOROTHY BORDLEY GASKINNS, MILTEER H. HENDRICKS, MILTON HENDRICKS, CHARLOTTE GRACE, LAWRENCE HENDRICKS III, SHELDON HENDRICKS, LISA HENDRICKS, KAREN LOPES, MABEL HENDRICKS, DONALD PETERS, LAWRENCE HENDRICKS, JR., THURALD HENDRICKS, JUNE HENDRICKS, JUDITH M. HENDRICKS, CHRISTINE HENDRICKS, PETER F. HENDRICKS, JANET HENDRICKS, KEVIN HICKS, BRICE HICKS, GERALDINE HICKS, VELMA HICKS, DELSCENA HICKS, BERTHA HICKS, ADELINE TRACY HICKS, WARREN M. HICKS, LISA B. HICKS, GARY HICKS, DONALD HICKS III, ADELINE B. HICKS, AMANDA HICKS, WARREN HICKS, JR., DONALD L. HICKS, LORETTA WHITE JONES, SHARON KENNEDY, BRAD LOPES, DEBRA LOPES, VINCENT LOPEZ, MARY LOPEZ, MARCIA LOPEZ, MARC LOPEZ, RITA LOPEZ, MARIE LOPEZ, ROBERT LOPEZ, ALICE LOPEZ, CARL MILLS, DELORES MILLS, RHONDA MILLS, RODNEY MILLS, CARLETTE MILLS, BRADFORD V. NORMAN, GERALD OAKLEY, WILBUR OAKLEY, RICHARD

OAKLEY, DONNA OAKLEY, KINO OAKLEY, FRANKLIN OAKLEY, LOIS OAKLEY, MAURICE OAKLEY, CATHERINE PERRY, NADINE PETERS, NEOTA PETERS, DARLINE PETERS, BERNADINE POCKNETT, ELSIE POCKNETT, DOUGLAS POCKNETT, VERNON POCKNETT, DONNELLA J. POCKNETT, WILLARD POCKNETT, VERNON M. POCKNETT II, LANSING POCKNETT, ELLEN FRYE SHARPE, CAROLINE OAKLEY, JUNE TIEXEIRA, CARMEN TUBBS, SEAMAN TURNER, SEAMAN TURNER II, RONALD TURNER, PATRICIA TURNER, HARRIET TURNER, CAROLYN J. TURNER, EDWIN WHITE, MARYANN HENDRICKS, TEDDY JOHN HENDRICKS, JULIUS TOBEY, VIOLA TOBEY, BETTY ANN BICKFORD, TRACY KUTCHEREA, PEARL TOBEY, MALCOLM TOBEY, NANCY TOBEY, ALTON TOBEY, ALCOTT TOBEY, YVONNE TOBEY, ROBIN TOBEY, ALTON TOBEY, ALTON TOBEY, JR., KEVIN TOBEY, DOROTHY PELLS, JANET PELLS, LINDA PELLS, LYDIA PELLS, SHIRLEY PELLS, HAROLD QUAN TOBEY, CLAUDE BAPTISTE, SQUANTO OAKLEY, JAMES CASH, PAUL R. HENDRICKS, BARBARA HENDRICKS, NINA LOPES, EVERETT TOBEY, HELEN ASHLEY, GARY COUETT, TERRY COUETT, CAROLINE OAKLEY, ALDEN LOPEZ, BESSIE TOBEY FRENCH, PETER FRENCH, LAVERNE FRENCH, CHARLENE FRENCH, CLAYTON CARLTON HENDRICKS, ELLEN M. HENDRICKS, HENDRICKS, MELISSA MELENDES, BETSEY HENDRICKS, BEATRICE JACKSON, LAVERNE JACKSON, ELEANOR JACKSON, WAYNE JACKSON, ROSALIE JACKSON, DIANNE JACKSON, ELMER W. HENDRICKS, STACY PETERS, KENNETH

TOBEY, LAWRENCE S. TOBEY III, EUGENE TOBEY, JR., BRYAN TOBEY, HAROLD TOBEY, NANCY OAKLEY, RUTH TOBEY WILLIAMS, VIOLET ORTIZ, ALMA SOUZA, MERTLE RIBEIRO, ROBERT HELME, GEORGE HELM, FLOYD HELM, RUSSELL HELME, BLANCHE DEAN, NORMA PETERS, DOROTHY INGE, QUAN TOBEY, SANDRA BELT, EUGENE BELT, KEVIN BELT, ERNESTINE BENSON, JUANITO BROWN, SONJA CARRINGTON, GINA M. CARRINGTON, LEE CARRINGTON, JR., CORRINE FERNANDES, BRENDA FERNANDES, DIANE JACKLIN FRIET, DOROTHY GREENE, ALFRED GREENE III, JOYCE GREENE, ALCOTT HAMMOND, LOUISE JACKLIN, PEARL LIMA, GEORGIANNA PELLS, DEANNA PRIDE, BELINDA PRIDE, MIRIAM ROCKET, ALICE SANTOS, ROBERT SANTOS, MELODY SANTOS, ALBERT SANTOS, WALTER SANTOS, JOSEPH SANTOS, SELENA THAYER, BONNIE THAYER, THELMA THAYER, CHARLES THAYER, JR., BILLY THAYER, CATHERINE THAYER, WILHELMINA TOBEY, ERNEST TOBEY, ERNEST TOBEY, JR., KEVIN TOBEY, ERIC TOBEY, COURTNEY TOBEY, ROLAND TOBEY, PAUL TOBEY, ROBERT J. TOBEY, BONNIE TOBEY, KATHY TOBEY, ERNESTINE TOBEY, THORNTON TOBEY, THORNTON TOBEY II, PAMELA TOBEY, DEBBIE TOBEY, ELIZABETH TOBEY, AARON TOBEY, JEAN TOBEY, MARC TOBEY, KAREN TOBEY, AARON TOBEY, JR., MARC TOBEY, GERTRUDE COOMBS TROTMAN, LINDAY COOMBS TROTMAN, TIMOTHY COOMBS TROTMAN, NELSON COOMBS TROTMAN, MARYLYN VIEGA, ERDINE WILLIAMS, DEBRA DEBARROS, CECILIA GOMES, VANESSA MENDES, NORENE MIRANDA, MICHELLE MIRANDA,

CECELIA TOBEY, EDGAR F. TOBEY, JR., ELLERY TOBEY, MARTY TOBEY, LAURA TOBEY, STEPHANIE TOBEY, GENEVIEVE LAMMERS, EDITH LAMMERS, JAMES LAMMERS, HARVEY LAMMERS, DAVID LAMMERS, EARL LAMMERS, PEARL WIXON LAMMERS, INEZ MILLS, RICHARD MILLS, GEORGE T. TOBEY, JR., GREGORY TOBEY, GINA TOBEY, GAY TOBEY, SHIRLEY MILLS, NICOLE TOBEY, JYL TOBEY, GLENNA COOMBS, ROGER TOBEY, GUSTAVUS COUETT, AURELIA COOMBS, SILAS NEWCOMB, BONITA COOMBS, ROBERT TOBEY, LAURA MARDENBRO, THOMAS HENDRICKS

PLAINTIFFS

v.

JAMES G. WATT, WILLIAM WELD, WILLIAM I. RANDALL, MARILYN M. SULLIVAN, JOHN E. FENTON, JR., SHIRLEY LEWIS, JOHN V. HARVEY, JOHN J. BOWES, STEPHEN WEEKES, WILLIAM C. NYE, COMMONWEALTH OF MASSACHUSETTS, TOWN OF MASHPEE

DEFENDANTS

Appendix D

(Separate Submission at Filing)

1. Complaint
2. Federal Answer
3. Morse Report
4. McKenney Report
5. Congressional Report
6. Schoolcraft Report
7. Earle Report

Mashpee II
Petitioners
Submission

83-624

APPENDIX D

(Separate Submission)

RECEIVED
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1. Complaint
2. Federal Answer
3. Morse Report
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7. Earle Report

14 October 1983

ROBT HAHN
40 Court St.
Boston, Mass.
Atty for Petitioners

D-1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE and)
MASHPEE INDIAN RESERVATION and)
EARL H. MILLS, SR., CHIEF)
ELLSWORTH OAKLEY)
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WALTER M. FRYE)
HERBERT NOYES)
NORMAN DIAS)
ROXANNE MILLS-BROWN)
PAULA D. PETERS)
LAWRENCE S. TOBEY, SR.) CIVIL ACTION NO. 81-3205-S
LAWRENCE S. TOBEY, JR.)
GEORGE T. TOBEY)
NATHANIEL J. TOBEY)
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S QUANTO OAKLEY
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BARBARA HENDRICKS
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NANCY OAKLEY)
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GEORGE HELM)
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RUSSELL HELME)
BLANCHE DEAN)
NORMA PETERS)
DOROTHY INGE)
QUAN TOBEY)
SANDRA BELT)
EUGENE BELT)
KEVIN BELT)
ERNESTINE BENSON)
JUANITO BROWN)
SONJA CARRINGTON)
GINA M. CARRINGTON)
LEE CARRINGTON, JR.)
CORRINE FERNANDES)
BRENDA FERNANDES)
DIANE JACKLIN FRIET)
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JOYCE GREENE)
ALCOTT HAMMOND)
LOUISE JACKLIN)
PEARL LIMA)
GEORGIANNA PELLS)
DEANNA PRIDE)
BELINDA PRIDE)
MIRIAM ROCKET)
ALICE SANTOS)
ROBERT SANTOS)
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SELENA THAYER)
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PEARL WIXON LAMMERS)
INEZ MILLS)
RICHARD MILLS)
GEORGE T. TOBEY, JR.)
GREGORY TOBEY)
GINA TOBEY)
GAY TOBEY)
SHIRLEY MILLS)
NICOLE TOBEY)
JYL TOBEY)
GLENNA COOMBS)
ROGER TOBEY)
GUSTAVUS COUETT)
AURELIA COOMBS)
SILAS NEWCOMB)
BONITA COOMBS)
ROBERT TOBEY)
LAURA MARDENBARO)
THOMAS HENDRICKS)
Plaintiffs)
)
v.)

JAMES G. WATT)
WILLIAM WELD)
WILLIAM I. RANDALL)
MARILYN M. SULLIVAN)
JOHN E. FENTON, JR.)
SHIRLEY LEWIS)
JOHN V. HARVEY)
JOHN J. BOWES)
STEPHEN WEEKES)
WILLIAM C. NYE)
COMMONWEALTH OF MASSACHUSETTS)
TOWN OF MASHPEE)
Defendants)

FIRST AMENDED COMPLAINT

INTRODUCTION

1. This is a civil action for declaratory and injunctive relief by which plaintiffs, for their Indian Community, for their Tribe, for themselves and for others similarly situated:

(a) Declare certain Indian land within the territorial jurisdiction of this Court known as the Mashpee Indian Reservation, is bound by federal sovereign policies against dealings with the title, the environmental resources, the historic and cultural significance and the archeological resources of such Indian land, without federal consent, as asserted by the United States Constitution, Art. 1, Sec. 8, Cl. 3, Art. 1, Sec. 10, Cl. 1 and Art. II, Sec. 2, Cl. 2; and as affirmed by 16 USC secs. 461 through 470n and 470aa through 470 11; 25 USC secs. 177 and 1322(b); 28 USC sec. 1360(b); and 42 USC secs. 4331 through 4335;

(b) Declare plaintiffs as they represent the Mashpee Indian Tribe, a dependent Indian Community, and as they are members-descendants thereof, are under the sovereign protection of the United States as asserted by the United States Constitution, Article 1, Section 8, Clause 3;

(c) Declare Chapter 463, Acts 1869 of the Massachusetts Legislature, as it purports, without federal consent, to authorize private dealings with said Mashpee Indian Reservation and as it purports to remove the Mashpee Indians from federal sovereign protection, violates the Supremacy, the Treaty, the Commerce and the Fourteenth Amendment Equal Protection and Due Process clauses of the United States Constitution, and is therefore, unconstitutional;

(d) Declare Chapter 293, Acts 1870 of the Massachusetts Legislature, as it purports, without federal consent, to incorporate the Mashpee Indian community as a political subdivision of Massachusetts, namely, the Town of Mashpee, and as it purports to transfer all its Tribal assets to the Town, including the Tribe's commons in land, funds, fishing, hunting, trapping, water, beaches, shores, wood, pasture, ice, buildings, monuments, cemeteries, cliffs, and other rights, and as Chapter 293 purports to empower the Barnstable County Probate Court to allot or sell the Tribe's common lands, also violates the Supremacy, the Treaty, the Commerce and the Fourteenth Amendment Equal Protection and Due Process clauses of the United States Constitution, and is therefore, unconstitutional;

(e) Declare actions by state, county and local officials and claims by private persons and organizations under color of said 1869 and 1870 legislation in derogation of said Mashpee Indian Reservation and said Mashpee Indian status, constitutes a deprivation of the rights, privileges or immunities of plaintiffs members-descendants under said 14th Amendment and 42 USC sec. 1983, and entitles plaintiffs to redress;

(f) Declare failure of the United States to assert its trust responsibility over said Mashpee Indian Reservation and said dependent Mashpee Indian community, deprives plaintiffs of their property and of equal protection in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution and entitles plaintiffs to redress;

(g) Declare plaintiffs are entitled to possession of said Indian land and to exercise all tribal and individual powers, prerogatives and commons relative thereto;

(h) Enjoin all defendants from further acts in derogation of plaintiffs' rights relative to said Mashpee Indian Reservation and to their said community, tribal and individual Indian status;

(i) Award plaintiffs counsel fees and expenses under 42 USC sec. 1988.

JURISDICTION

2. This Court has jurisdiction under the United States Constitution, Article 1, Section 8, Clause 3, Article III, Section 2, and Amendments Five and Fourteen; and under the United States Code, Title 5, Section 701 et seq; Title 16, Sections 461 through 470n and 470aa through 470 11; Title 18, Sections 1151 and 1162(b); Title 25, Sections 177, 1302, 1321(b) and 1322(b); Title 28, Sections 1331, 1337, 1343(3)(4), 1345, 1346, 1355, 1360(b), 1361, 1362, 1655, 2201 and 2415; and Title 42, Sections 1983, 1988 and 4331 through 4335; and under its general equity jurisdiction including federal Indian common law as it recognizes inherent federal power over Indians and Indian lands.

PARTIES

3. Plaintiffs:

(a) Gertrude Aikens, Philip, Eric and Victor Almeida, Sandra Alves, Richard and Inez Mills, Renee Hendricks Banks, Amelia Bingham, Mildred, Ogden and Marlene E. Black, Carol S. and Frederick V. Brown, Alden Lopez, Dorothy, Earl N. (Sr.) and Earl N. (Jr.) Cash, Bernard and Anita Coombs, Cindy, Juanita, Aneba, Vickie, Denise, Linda, and Margaret L. Costa, Minnie L. DeGrasse, Norman Dias, Marjorie H. Duarte, Tarlton A. Edwards, Walter M. Frye, Gkisedtanamoogk, Rita and Peter Gonsalves, Nancy and Bernice Grant, Delscena, Lincoln, Myron, Teddy W., Winona, Curtis L., Carlton, Milteer H., Milton, Patricia, Lawrence III, Sheldon, Lisa, Ellen M, Mabel, Elmer W., Lawrence Jr., Thurald, June, Judith M., Christine, Peter F. and Janet Hendricks. Kevin, Brice, Geraldine, Velma, Delscena, Bertha, Lisa B., Adeline Tracy, Warren M., Gary, Donald III, Adeline B., Amanda, Warren, Jr. and Donald L. Hicks, Loretta White Jones, Sharon Kennedy, May L., Brad and Debra Lopes, Vincent, Mary, Marcia, Marc, Rita, Marie, Alice and Robert Lopez, Earl H. Sr., Earl H. Jr., Carl, Delores, Rhonda, Rodney and Carlette Mills, B.V., Squanto, Norman, H.N., Nancy , Ellsworth, Gerald, Caroline, Wilber, Richard, Kino, Franklin, Lois, Donna, E.M., E.W. and Maurice Oakley, Catherine Perry, J.A. Sr. and Jr., Stacy, Norma, Donald, Russell, W.J., P.D., L. G., Nadine, Neota and Darline Peters, Bernadine, Frederick, Oliver, Elsie, Douglas, Vernon, Donnella J., Willard, Vernon M. and Lansing Pocknett, Ellen Frye Sharpe, S.P & C. Bilock, Joan Avant Tavares, June Tiexeira, Carmen Tubbs, Seaman, Seaman II, Ronald, Patricia, Harriet and Carolyn J. Turner, and Edwin White, all of Mashpee; Clarence and Virginia Moran of Avon; Maryann and Teddy John Hendricks, Julius and Viola Tobey, all of Boston; Betty Ann Bickford, Tracy Kutcheres, John Mendes, and Pearl, Malcolm, Malcolm Jr., Nancy, Alton, Alcott, Yvonne, Robin, Alton, Alton Jr. and Kevin Tobey, all of Bourne; Michele Turpin of Burlington; Dorothy, Janet, Linda, Lydia and Shirley Pells, and Harold Quan Tobey, all of Centerville; Claude Baptiste, Shirley Mills, James Cash, Paul R. and Barbara Hendricks, Nina Lopes, Roxanne Mills-Brown, Earle H. Mills, Jr., and Everett Tobey, all of Falmouth; John Newcomb of Forestdale; Helen Ashley of Cay Head; Allen H. and Wayne Bearse, Jean Bonner, Elizabeth DeGrace, Bessie Tobey, Peter, Laverne and Charlene French, Gary & Terry Couett, Clayton Hendricks, S.E. Lopes, M. Melendes, K., L.S. Jr. and III, E. Jr., B. and H. Tobey, B. Oakley and Ruth Tobey Williams, all of Hyannis; Clinton Attaquin Haynes, Daisy Moore, Anita Nielson and Violet Ortiz of Middleborough; Blanche Dean, Robert, George, F.R., L., C., M., & S. Helme; M. Riberio, A. Souza, the Lammers, and C.O. Floyd, all of New Bedford; J. and I. Oakley of Haverhill; K. Lopes, C. Grace and the Jacksons of Boston; L. Stanley and B. Bickford of Marstons Mills;

D. Inge & Q. Tobey-Osterville; Sandra, Eugene and Kevin Belt, Ernestine Benson, Juanito Brown, Sonja, Gina M. and Lee Jr. Carrington, Rhoda M., Corrine and Brenda Fernandes, Diane Jacklin Friet, Dorothy, Joyce and Alfred III Greene, Alcott Hammond, Louise Jacklin, Pearl Lima, Laura Mendes, Silas A. Newcomb, Jr., Georgianna Pells, Deanna and Belinda Pride, Miriam Rocket, Alice, Robert, Melody, Albert, Walter and Joseph Santos, Selena, Bonnie, Catherine, Thelma, Billy and Charles Jr. Thayer, Wilhelmina, Ernest, Ernest Jr., Kevin, Eric, Courtney, Roland, Paul, Robert Jr., Malcolm G., Malcolm Jr., Bonnie, Kathy, Ernestine, Thornton, Thornton II, Pamela, Debbie, Elizabeth, Aaron, Jean, Marc, Karen, Aaron Jr. and Marc Tobey, Gertrude Coombs, Linday Coombs, Timothy Coombs and Nelson Coombs Trotman, Marylyn Viega and Erdine Williams, all of Pocasset; Debra DeBarros, Cecilia Gomes, Vanessa Mendes, Norene and Michelle Miranda, and Cecelia, Edgar F. Sr., Edgar F. Jr., Ellery, Marty, Laura and Stephanie Tobey, all of Santuit; L. White of Waquoit; M. Coombs of Wareham, L.S. Sr., George T., Nathaniel Jr., George T. Jr., Gregory, Gina and Gay Tobey, all of West Hyannisport; Putnam Peters and Nicole Tobey of Yarmouth; are all citizens of Massachusetts; and Glenna Coombs of Los Angeles and Jyl Tobey, D. Gaskinns, D&R Floydof California; Thomas Hendricks, Laura Mardenbro and Robert Tobey, all of Connecticut; Bonita Coombs of Miami, Florida; Silas Newcomb of Michigan; Aurelia Coombs and Gustavus Couett, both of Providence, Rhode Island; and Roger Tobey of Wisconsin; are all citizens of the United States, who claim on behalf of the Mashpee Tribe (also known as part of the South Sea Indians), a recognized dependent Indian community of the United States; and on their own behalf as they are members-descendants of said Tribe;

(b) The foregoing plaintiffs also claim on behalf of a class consisting of the members-descendants of said Mashpee Indian tribe as of the 1849 and 1861 tribal censuses;

(c) The foregoing class of members-descendants of the Mashpee Indian tribe, are so numerous that joinder of all members is impracticable. There are, however, questions of law and fact common to the class, the claims of plaintiffs are typical of the claims of the class and plaintiffs will fairly and adequately represent the interests of the entire class. In addition all defendants have acted, refused or failed to act on grounds generally applicable to the entire class, thereby making declaratory relief appropriate to said class as a whole.

4. Public Defendants:

(a) James G. Watt of Washington, D.C. is United States Secretary of Interior whose duties include executive responsibility for Indian affairs; William Weld of Needham, Massachusetts is United States Attorney for the District of Massachusetts and generally responsible for federal legal questions arising in said District; William I. Randall of Framingham, Marilyn M. Sullivan of Wollaston, and John E. Fenton, Jr., of Andover and all of Massachusetts, are respectively Chief Justice and Associate Justices of the Massachusetts Land Court: Shirley

R. Lewis of Taunton and John V. Harvey of Cotuit; John J. Bowes of Barnstable and Stephen Weekes of Harwich, and all of Massachusetts, are respectively First Justice and Associate Justice of Probate, and Sheriff and Register of Deeds for Barnstable County.

(b) The Commonwealth of Massachusetts is one of the States of the United States; and the Town of Mashpee is an alleged duly constituted municipal corporation of said Commonwealth of Massachusetts.

5. Private Defendants:

(a) William C. Nye of Barnstable, Massachusetts claims or holds adversely to plaintiffs certain portions of the Mashpee Indian Reservation;

(b) The foregoing private defendant also represents a class consisting of personswho hold or claim adversely to the plaintiffs;

(c) The foregoing class of defendants is so numerous that joinder of all members is impracticable. There are, however, questions of law and fact common to the entire class, the claims of the private defendants are typical of the claims of said class and said defendants will fairly and adequately represent the interests of said class. In addition, all said defendants have acted, refused and failed to act on grounds generally applicable to the class thereby making declaratory and injunctive relief appropriate to the class as a whole.

INDIAN LAND INVOLVED

6. The Indian land involved consists of the entire estimated 16,000 acre Mashpee Indian Reservation (formerly called Marshpee District), see attachment "A", is part of the Indian lands of Massachusetts, see attachment "B", and includes the geographical area of the so-called town of Mashpee, a defendant herein. See attachment "C". Plaintiffs hereby affirm all additions to and challenge all deletions from said Reservation as the net result of any Act of Massachusetts or the United States after 1789.

APPLICABLE LAW

7. Constitutional Provisions:

The United States Constitution provides in pertinent part:

(a) "The Congress shall have the power...to regulate Commerce...with the Indian Tribes." Article I, Section 8, Clause 3.

(b) "This Constitution, and the Laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, Clause 2.

(c) "No person shall...be deprived of...property, without due process of law...." Amendment 5.

(d) "No state shall enter into any treaty...." Art. 1, Sec. 10, Cl. 1.

(e) "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of...property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendment 14.

8. Statutes:

The United States Congressional Acts provide in pertinent part:

(a) "No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from (any Indian), any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 USC sec. 177 (parenthetical phrase added per sec. 29, Acts 1834, Sess. 1, Ch. 16).

(b) "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein." 18 USC 1162(b), 25 USC 1321(b) and 1322(b), 28 USC 1360(b)(P.L. 280).

(c) "The Congress...recogniz(es) the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recogniz(es) further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man...." NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 42 USC sec. 4331(a).

(d) "It is declared that it is a national policy to preserve for public use historic sites, buildings, and objects of national significance for the inspiration and benefit of the people of the United States." 16 USC sec. 461.

(e) "The Congress finds that -- (1) archaeological resources on public lands and Indian lands are an accessible and irreplaceable part of the Nation's heritage; (2) these resources are increasingly endangered because of their commercial attractiveness; (3) existing Federal laws do not provide adequate protection to prevent the loss and

destruction of these archaeological resources and sites resulting from uncontrolled excavations and pillage...." 16 USC sec. 470aa(a).

(f) "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 USC sec. 1983.

(g) "In any action or proceeding to enforce...section( ) 1983 of this title...the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs." 42 USC sec. 1988.

9. Official Legal Opinions:

The United States Attorney General Opinions provide in pertinent part:

(a) "Upon examination of the statutes and treaties, I feel justified in coming to the conclusion that it was the intention of Congress that the inhibition contained in section 2116, Revised Statutes (now 25 USC sec. 177), should have the same application to individual Indians that it has to the Indian nations and tribes...." 18 OPS. ATTY. GEN. 486 (1886)(clarification supplied).

10. Cases:

The Federal and State Court Opinions provide in pertinent part:

(a) "It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign -- first the discovering European nation and later the original States and the United States -- a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law.

* * * *

"The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent applies in all of the States, including the original 13." ONEIDA INDIAN NATION OF NEW YORK v. COUNTY OF ONEIDA, 414 US 661, 667, 670 (1974)(emphasis added).

(b) "The next year, 1789, the United States was formed and Massachusetts' sovereignty over the Indian lands ebbed." EPPS v. ANDRUS, 611 F2d 915, 916 (1st Cir. 1979).

(c) "Under section 8, article 1, of the Constitution of the United States, the power to regulate commerce with the Indian tribes is vested in Congress. This power has been most liberally construed. It is a continuing power and cannot be abdicated. It covers traffic or intercourse, not only with Indian tribes, but also with a member of such tribe, although within the limits of a state." BROWNING v. UNITED STATES, 6 F2d 801, 807, 808 (1925), citing UNITED STATES v. HOLLIDAY, 3 Wall. 407 (1865)(emphasis added).

(d) "To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights." McCLANAHAN v. ARIZONA STATE TAX COMMISSION, 411 US 164, 181 (1973).

(e) "The treaty was with the tribe; but the right of taking fish at all places within the reservation, and usual and accustomed grounds and stations outside the reservation, was plainly a right common to the members of the tribe -- a right to a common is the right of an individual of the community." MASON v. SAMS, 5 F2d 255, 258 (WD Wash. 1925) (emphasis added).

(f) "From MASON it is clear that an individual Indian enjoys a right of user in tribal property derived from the legal or equitable property right of the Tribe of which he is a member." KIMBALL v. CALLAHAN, 590 F2d 768, 773 (9th Cir. 1979), cert. den. 444 US 826 (emphasis added).

(g) "There seems to be no doubt that a right of common... is such a title in the land as may sustain a claim for compensation...." THOMAS v. MARSHFIELD, 27 Mass.(10 Pick.) 364, 366 (1830).

(h) "(T)he plaintiff may individually well support an action of the case for an injury to his right of common, however small the damage." KENYON v. NICHOLS, 1 RI 106, 110 (1848).

(i) "That rights in property are basic civil rights has long been recognized. ...Congress recognized these rights in 1871 when it enacted the predecessor of sections 1983 and 1343(3). We do no more than reaffirm the judgement of Congress today. LYNCH v. HOUSEHOLD FINANCE CORP., 405 US 538, 552 (1972).

(j) "We concluded...this court had jurisdiction to entertain the action...under 28 USC sec. 1343(3) and 42 USC sec. 1983 with respect to individual Tribal members." CONFEDERATED SALISH & KOOTENAI TRIBES v. MONTANA, 392 F. Supp. 1325, 1327 (D. Mont. 1975).

(k) "(28 USC) Section 1331 is...available to these (individual Indian) plaintiffs as a jurisdictional basis for their claims." ONEIDA INDIAN NATION OF WISCONSIN v. STATE OF NEW YORK, 520 F. Supp. 1278, 1290 n. 10 (NDNY 1981).

(l) "(A) cause of action may be implied directly under the Equal Protection Component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right." DAVIS v. PASSMAN, 442 US 228, 242 (1979).

(m) "(W)here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." BELL v. HOOD, 327 US 678, 684 (1946).

FACTS OF CASE

11. Archeological digs indicate plaintiffs' aboriginal ancestors came to Cape Cod about 11,000 years ago.

12. The Mashpee or Marshpee Tribe, whose original name was Massipee or Massapee meaning "great waters", occupied and controlled the Cape Cod area today known as Mashpee. Smaller groups under their control included the Coatuits, Satuits, Pawpoesits, Wakoquets, Ashimuets, Weesquobs and Saukatucketts.

13. Before long, the whites referred to the mid and lower Cape tribes as the South Sea Indians, including the Mashpees, "south sea" presumably meaning Buzzards Bay and Vineyard Sound.

14. During the mid 1600s Richard Bourne, a white farmer in South Sandwich sympathetic to the mid Cape Indians, became concerned about the swift occupation of Indian lands by whites. So Bourne arranged to reserve a 12,500 acre tract exclusively for the Indians which he called the Plantation of Marshpee.

15. In 1685, after many years of persistent effort, during which Bourne was ordained Minister to the Marshpee Indians, the Plymouth General Court formally granted the Mashpee reservation to the "South Sea Indians and their children", subject to an Indian and sovereign alienation restriction, thereby investing the Marshpee Indians as tenants in tail and securing a tribal land base of approximately 16,000 acres.

16. In 1692, a King's Charter merged Massachusetts Bay and Plymouth Colonies into the Province of Massachusetts Bay, thereby bringing the Mashpee Tribe and their Reservation under Provincial control.

17. In 1723, although the Provincial legislature organized Mashpee as a proprietary, the 1685 plan was left intact, namely, that the Mashpee Tribe be continued as a permanent dependent Indian community with its land base subject to sovereign alienation restriction.

18. In addition, the Mashpees retained their tribal commons and individual rights to said commons, including funds, hunting, fishing, trapping, seaweed, peat, wood, pasture and others, thereby maintaining their Indian community [illegible] Reservation to the present time.

19. On March 4, 1789, the United State of America became operational. Under its new Constitution, Massachusetts, along with the 12 other original States, ceded exclusive authority to the central government to deal with the Indians, thereby ending Massachusetts' control over the Mashpee Indian community and their Reservation.

20. In 1790, Congress passed the first national Indian Trade and Intercourse Act, thereby affirming both the constitutional principle and a continuing sovereign policy restricting Indian land transactions established by the English Crown during the colonial period and continued by the 13 original States during their brief sovereignties from 1780 until early 1789.

21. In 1820, Dr. Jedidiah Morse, at the direction of President Monroe and Secretary of War Calhoun, visited, investigated and inventoried all the Indian Tribes of the United States. Dr. Morse included the Marshpee Tribe of Massachusetts, as one who "reside on their...Reservations", in his Report to the President, the Secretary of War and the Congress.

22. In 1825, Col. Thos. L. McKenney of the Indian Department, at the direction of Secretary of War Calhoun, prepared a Report, listing the Marshpees as one of the "remaining" Indian Tribes in the United States "residing on their respective reservations."

23. Between 1827 and 1869, Massachusetts issued eleven reports or other documents affirming the continued existence of the Marshpees and their Reservations as one of the "distinct bands, communities or tribes having ...reservations..., with 403 tribal members and 16, 132 acres of land.

24. In 1972, United States Indian Commissioner Lewis R. Bruce, in forewording an Indian Bureau publication, referred to the Mashpee Community of Massachusetts as one of "those (Indian tribes, bands or groups) for which the Bureau.. has definite responsibility."

25. In 1979, the United States Department of Interior, in a condemnation proceeding, acknowledged the Mashpee Tribe as a successor in interest to a parcel of Nauset Indian land in Wellfleet, and paid $33,750 therefor.

26. In 1869, 80 years after Massachusetts' sovereignty over the Indians and Indian lands within the Commonwealth had ended, the Massachusetts legislature, without federal authority, passed Chapter 463, Acts 1869, purportedly stripped all Indians in Massachusetts including the Mashpees, of their Indian status and federal protection, and purportedly lifted the federal alienation restriction on Indian land, including the Mashpees'. See attachment "B".

27. In 1870, one year later, again without federal authority, by Chapter 293, Acts 1870, Massachusetts purportedly incorporated the Mashpee Indian community and their Reservation as a town, purportedly transferred to the Town the Mashpee Tribal commons in land, funds, fishing and other rights, and purportedly empowered the Barnstable County Probate Court to allot or sell the Mashpee tribal lands.

28. Pursuant to this legislation, various deeds have been given by Indians without federal consent, resulting in substantial non-Indian intrusion on the Mashpee Reservation, destruction of Indian environment, structures and monuments, and construction of non-Indian structures

and installations servicing same.

29. Also pursuant to this legislation, various petitions by non-Indians have been presented to the Massachusetts Land Court, asking registration of their purported titles to portions of the Mashpee Indian Reservation. The Land Court has entertained these petitions, and without federal consent, entered decrees as prayed. For example, see Reg. No. 39358 below.

30. Pursuant to said illegal 1870 Massachusetts legislation, and without federal authorization, the Town of Mashpee has assumed de facto Mashpee tribal powers, by purportedly taxing the Mashpee Reservation, asserting purported land use control over some or all said Reservation through zoning by-laws, building permits, special permits and the like. In addition, the Town has further usurped Tribal authority by asserting purported control over the Tribal commons, such as hunting, fishing, trapping, water, beach and other rights and permitting non-Indian exercise of same.

31. From 1789 to the present day, the Mashpee Indian community and their Reservation have been federally recognized and under the exclusive sovereign control of the United States.

32. The plaintiff members-descendants and their ancestors have been members of said Mashpee Indian community known as the Mashpee tribe exclusively occupying their said Reservation from time immemorial to the present.

33. Neither the Mashpee Tribe, their community nor their Reservation have been terminated by the United States or any prior sovereign.

34. At no time has the United States prevented or corrected these illegal acts by the Commonwealth of Massachusetts and its Courts, the Town of Mashpee and the non-Indian trespassers, or sought redress of the wrongs done, or accorded the same protection to the Mashpee Indian community, its members-descendants and their Reservation as accorded other dependent Indian communities in the United States, their members-descendants and their Reservations.

JUSTICIABLE CONTROVERSY

35. Plaintiffs, on behalf of the Mashpee Tribe, individually and for their class, hereby challenge all non-federally authorized Acts of the Massachusetts Legislature after 1789 in derogation of the Mashpee Indian Community, Tribe and Reservation, including the purported stripping of their status as federal wards and Indians and purportedly lifting the federal alienation restriction on their Reservation.

36. Plaintiffs, on behalf of the Mashpee Tribe, individually and for their class, hereby challenge the non-federally authorized jurisdiction of the Barnstable County Probate Court to adjudicate any purported partitions of the Mashpee Reservation.

37. Plaintiffs, on behalf of the Mashpee Tribe, individually and for their class, hereby challenge the non-federally authorized jurisdiction of the Massachusetts Land Court to purportedly adjudicate title to any part of the Mashpee Reservation, including a pending Registration Petition No. 39358 by William Nye, one of the defendants herein.

38. Plaintiffs, on behalf of the Mashpee Tribe, individually and for their class, hereby disclaim all non-federally approved deeds to non-Indians from themselves, their ancestors, their descendants, heirs and next of kin under color of said Chapter 463, Acts 1869 and Chapter 293, Acts 1870.

39. Plaintiffs, on behalf of the Mashpee Tribe, individually and for their class, hereby challenge the non-federally authorized jurisdiction of the Town of Mashpee to usurp Mashpee tribal power over the Mashpee Reservation including their inland and ocean waters, beaches and shores, or any of the tribal commons in hunting, fishing (including shell and non-shell, inshore, offshore, surf and inland), trapping, boating, bathing, water and other rights.

40. Plaintiffs, on behalf of the Mashpee Tribe, individually and for their class, hereby challenge the non-action or failure of the United States to help them by preventing and correcting the acts complained of or by seeking other redress of the harm done.

PRAYERS FOR RELIEF

Preliminary Orders

WHEREFORE, plaintiffs respectfully ask that pending final determination of this action, to prevent immediate, future and irreparable harm to plaintiffs and their class and to prevent further complication of the issues herein, this Court enter an order preliminarily restraining:

1. Defendants William I. Randall, Marilyn M. Sullivan and John E. Fenton, Jr., as they are respectively Chief Justice and Associate Justices of the Massachusetts Land Court, from proceeding further with Land Court No. 39358 (Reg.) or any other matter now pending before or which may be entered in said Court purporting to affect title to the Mashpee Indian Reservation described herein;

2. Defendants Shirley Lewis and John Harvey, as they are First Judge and Judge of Barnstable County Probate Court, from proceeding with any matter now pending before or which may be entered in said Court affecting the Mashpee Indian Reservation described herein;

3. Defendant John Bowes, as he is Sheriff of Barnstable County, from serving any State, County or Mashpee based process or holding any Sheriff's sales, involving the Mashpee Indian Reservation described herein;

4. Defendant Stephen Weekes, as he is Register of Deeds and Assistant Land Court Recorder of Barnstable County, from recording any non-federally approved deeds, leases, decrees or other instruments involving or affecting the Mashpee Indian Reservation described herein;

5. Defendant Town of Mashpee from taxing, taking or selling any part of the Mashpee Indian Reservation described herein; from permitting any building, alteration, demolition, water connection or waste disposal system, or other land use or structural permits to or for non-Indians affecting said Reservation; from permitting any non-Indian fishing (including shell and non-shell), hunting, trapping, boating, bathing,

and the like, on the land and the inland and salt water beaches and shores of said Reservation; from doing or failing to do any act which will negatively affect Indian or Indian related structures, monuments, roads, trails, burial grounds and the like on or within said Reservation; from using any monies raised from taxing said Reservation to pay to defend instant action or otherwise used to oppose plaintiffs herein.

General Relief:

Further, plaintiffs ask this Court declare that:

1. Chapter 463, Acts 1869, of the Massachusetts Legislature, as it purports, without federal authority, to terminate dependent Indian communities in Massachusetts including the Mashpee tribe, and as it purports to terminate Indian wardship and Indian status, and as it purports to terminate Indian Reservations in Massachusetts by authorizing allotment and alienation of tribal lands including the Mashpee tribal land, violates the Supremacy, the Treaty, the Commerce and the Fourteenth Amendment Equal Protection and Due Process clauses of the United States Constitution, and is therefore, unconstitutional;

2. Chapter 293, Acts 1870 of the Massachusetts Legislature, as it purports, without federal consent, to incorporate the Mashpee Indian community as a political subdivision of Massachusetts, namely, the Town of Mashpee, and as it purports to transfer all the Tribal assets to the Town, including the Tribe's common lands, its common funds, its fishing and other rights, and as Chapter 293 purports to empower the Barnstable County Probate Court to allot, or sell the tribal common lands, also violates the Supremacy, the Treaty, the Commerce and the Fourteenth Amendment Equal Protection and Due Process clauses of the United States Constitution, and is therefore, unconstitutional;

3. All decrees of the Massachusetts Land Court and the Barnstable County Probate Court, all acts of Barnstable County and the Town of Mashpee, and all claims based upon private deeds or adverse user, affecting or dealing with the Mashpee Indian Reservation under color of said legislation, are null and void;

4. All non-Indians occupying any part of the Mashpee Indian Reservation under color of said legislation, or under any deed or decree pursuant thereto or descending therefrom, or by adverse user, are trespassers;

5. Such non-Indian trespass which includes completed and in progress structures for non-Indian use and services occupying, appurtenant or relative thereto, and which result in substantial damage to Indian environment such as usurping, destroying, polluting and depleting such Indian resources as land, timber, vegetation, beaches, water, air, fish, game and the like, are illegal;

6. Plaintiffs are entitled to possession and other redress.

In Rem Relief:

Further, plaintiffs ask this Court declare that:

7. The Mashpee Indian Reservation:

(a) Is an existing Indian reservation and Indian country;

(b) Is federally recognized;

(c) Is subject to inherent federal power over Indian land;

(d) Is subject to Article 1, Section 8, Clause 3 of the United States Constitution;

(e) Is subject to 25 USC sec. 177.

Tribal Relief:

Further, plaintiffs ask the Court declare that:

8. The Mashpee Indian Tribe:

(a) Is a dependent Indian community known as the Mashpee Tribe;

(b) Is federally recognized;

(c) Is subject to Article 1, Section 8, Clause 3 of the United States Constitution;

(d) Is under exclusive federal trust protection;

(e) Has a land base, namely, the Mashpee Indian Reservation;

(f) Is one of the dependent Indian communities of the United States; with the right to participate in federal programs and to receive federal grants; the right to tribal government, tribal elections and tribal funds; and the right to maintain other commons including fishing, hunting, pasturing, bathing, boating, wood, water, air, peat, seaweed, minerals, ice and the like.

9. Under color of Chapter 463, Acts 1869 and Chapter 293, Acts 1870, the Commonwealth of Massachusetts, the Land Court, the Barnstable County Probate Court and the Town of Mashpee deprive and diminish the Mashpee Tribal right to:

(a) Its land base;

(b) Its status as an Indian community;

(c) Its powers, prerogatives and commons.

10. Such deprivation and diminution:

(a) Violates Art. VI, Cl. 2, Art. 1, Sec. 8, Cl. 3, Art. 1, Sec. 10, Cl. 1 and Art. II, Sec. 2, Cl. 2, U.S. CONST.;

(b) Violates inherent federal power over Indian matters;

(c) Violates the Nonintercourse Act, 25 USC sec. 177;

(d) Entitles plaintiff Mashpee Tribe to redress, including damages and restraining orders.

11. By standing by and permitting the foregoing deprivation and diminution under color of state law, the United States is in breach of its trust duty and deprives and diminishes the Mashpee tribal right:

(a) To its land base;

(b) To its status as an Indian community;

(c) To its powers, prerogatives and commons.

12. Such deprivation and diminution:

(a) Is a breach of trust under federal equity and Indian common law standards;

(b) Is a breach of trust under federal due process and equal protection standards;

(c) Is a breach of trust under the commerce clause, United States Constitution, Article 1, Section 8, Clause 3;

(d) Isa breach of trust under the Nonintercourse Act, 25 USC sec. 177;

(e) Entitles plaintiff Mashpee Tribe to redress.

Individual Relief:

Further, plaintiffs ask the Court declare that:

13. Under color of Chapter 463, Acts 1869 and Chapter 293, Acts 1870, the Commonwealth of Massachusetts, the Land Court, the Barnstable County Probate Court and the Town of Mashpee deprive and diminish the right of the individual members-descendants of the Mashpee Tribe:

(a) To be a part of an Indian community and to share in tribal powers, prerogatives and commons;

(b) To their status as Indians;

(c) As tenants-in-tail of the Mashpee Indian Reservation;

(d) To a common in fishing, hunting, boating, pasturing, bathing, wood, water, air, peat, seaweed, minerals, ice and the like.

14. Such deprivation and diminution:

(a) Denies 14th Amendment equal protection and due process;

(b) Violates inherent federal power over Indian matters;

(c) Violates the commerce and treaty clauses: Art. 1, Sec. 8, Cl. 3, Art. 1, Sec. 10, Cl. 1 and Art. II, Sec. 2, Cl. 2;

(d) Violates the supremacy clause (Article VI, Clause 2);

(e) Violates their civil rights (42 USC sec. 1983);

(f) Violates their environmental rights (42 USC secs. 4331-4335);

(g) Violates their water rights (25 USC sec. 1322(b));

(h) Entitles plaintiffs members-descendants to damages;

(i) Entitles plaintiffs members-descendants to restraining orders.

15. By standing by and permitting the foregoing deprivation and diminution under color of state law, the United States is in breach of its trust duty and deprives and diminishes the right of the individual members-descendants of the Mashpee Tribe:

(a) To be part of an Indian community;

(b) To their Indian status;

(c) As tenants-in-tail of the Mashpee Indian Reservation;

(d) To a common in fishing, hunting, trapping, boating, pasturing, bathing, wood, water, peat, seaweed, minerals, ice and the like.

16. Such deprivation and diminution:

(a) Denies 5th Amendment equal protection;

(b) Denies 5th Amendment due process;

(c) Violates the commerce clause (Article 1, Section 8, Clause 3);

(d) Entitles plaintiffs members-descendants to redress;

(e) Entitles plaintiffs members-descendants to federal assistance in regaining possession and getting damages.

And further, plaintiffs ask the Court order that:

17. All non-Indian structures, and all installations servicing same such as roads, water mains, disposal systems, telephone and electric lines, fences, barriers, gates, signs and the like be removed forthwith and the land, waters and environment be restored to their original condition, according to plaintiffs' preference.

And finally, plaintiffs ask the Court declare:

18. An award of counsel fees and expenses to plaintiffs pursuant to 42 USC sec. 1988.

19. Such other relief as the Court deems appropriate.

Respectfully submitted,

18 January 1982

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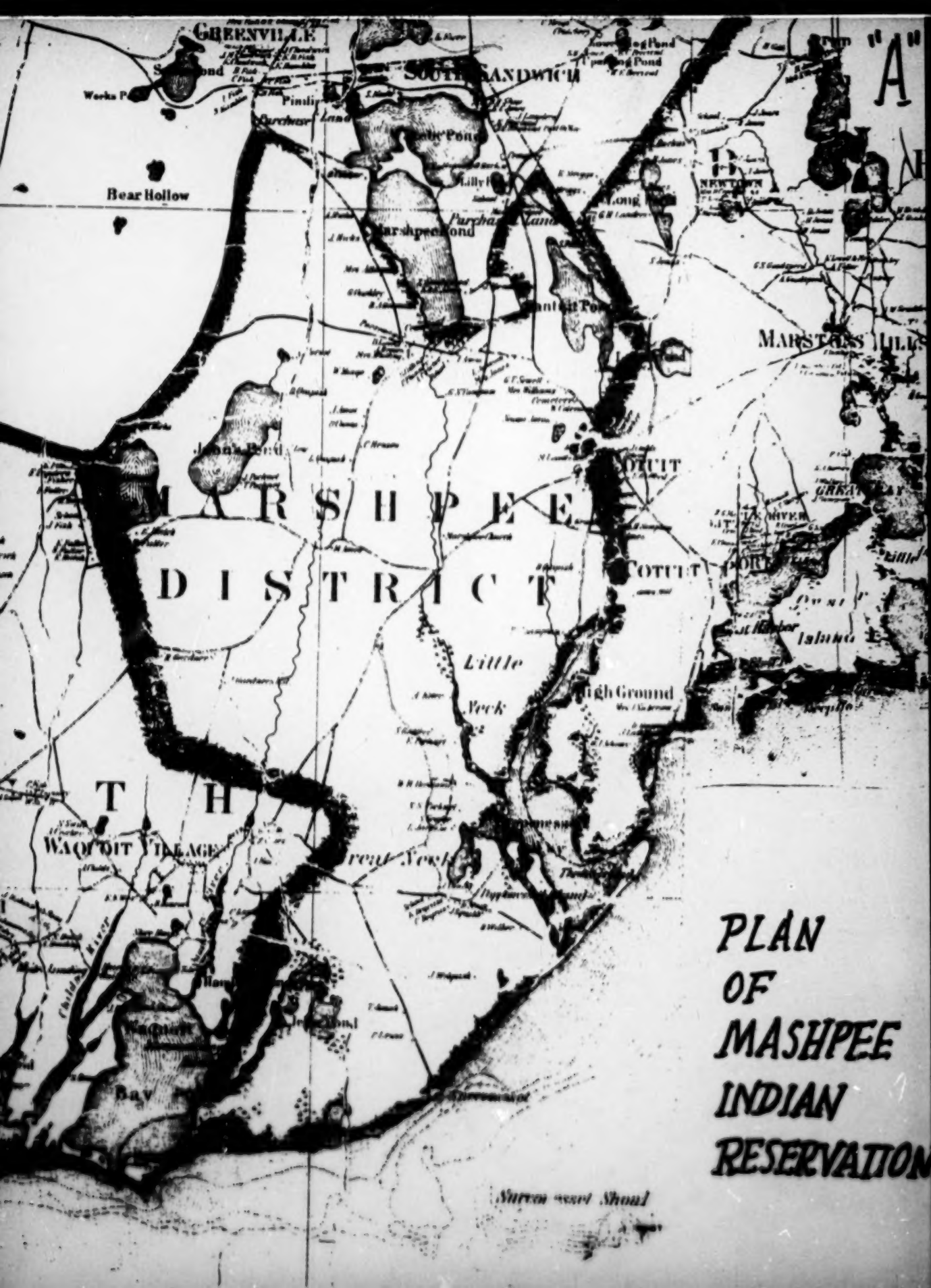
GREENVILLE
SOUTH SANDWICH
Bear Hollow
Marshpee Pond
NEWTOWN
MARSTONS HILLS
MARSHPEE
DISTRICT
Little
Pock
High Ground
WAQUOIT VILLAGE
Bay
Shiverd wood Shoal
PLAN
OF
MASHPEE
INDIAN
RESERVATION

"B"

An Act to enfranchise the Indians of the Commonwealth.

Be it enacted, &c., as follows:

Sect. 1. All Indians and people of color, heretofore known and called Indians, within this Commonwealth, are hereby made and declared to be citizens of the Commonwealth, and entitled to all the rights, privileges and immunities, and subject to all the duties and liabilities to which citizens of this Commonwealth are entitled or subject.

Sect. 2. All lands heretofore known as Indian lands, and rightfully held by any Indian in severalty, and all such lands which have been or may be set off to any Indian, shall be and become the property of such person and his heirs in fee simple: *provided*, that such lands, shall not be held liable to be taken upon attachment or execution for any debt or liability which existed before the passage of this act; and all Indians shall hereafter have the same rights as other citizens to take, hold, convey and transmit real estate.

Sect. 3. The judge of probate of the county in which any lands held in common belonging to any tribe of Indians may lie, except in the case of the Indians of Marshpee and Gay Head, upon the application of any member of said tribe, after notice to all parties interested and a hearing of the same, if in his opinion it is for the interest of said parties that any or all of said lands be divided, shall appoint two discreet, disinterested persons commissioners to make partition of the same, and their award, being confirmed by said court, shall be final in the premises; but if he shall adjudge that it is for the interest of said parties that the same, or a part of the same, be sold, he shall direct the said commissioners, after they shall have given such bonds as the court may require, to proceed to sell any or all of said lands, and to divide the proceeds of the same among the parties rightfully entitled thereto in proportion to their several interests therein, under the direction of the said court; and the judge of probate of the county in which any lands heretofore and now known as Indian lands, and claimed in severalty by any Indians, may lie, shall direct the said commissioners to examine and define the boundaries of the lands rightfully held by individual owners, and shall properly describe and set forth the same in writing, and such description being approved by the court, shall be final in the premises; and the same, together with all deeds of partition, division or sale made by such commissioners shall be recorded in the registry of deeds in the county, and the expenses of said commissioners, including the cost of recording said deeds, the same being approved by the judge of probate, shall be paid out of the treasury of the Commonwealth, the same being also approved by the governor and council.

Said commissioners are authorized to sue for, collect and receive all funds belonging to, or held in trust for, any tribe of Indians for which said commissioners are appointed; and all such funds shall be divided by said commissioners among the parties rightfully entitled thereto under the direction of the probate court of the county in which such tribe resides; and any property held in trust by any person for any tribe of Indians shall be sold by such person under the direction of the judge of probate, and the proceeds of such sale shall be paid over to the commissioners to be divided as aforesaid. The judge of probate of Plymouth county shall have jurisdiction over all matters relating to the Herring Pond Indians under this section.

Any person aggrieved by any order, decree or denial of the judge of probate under this act, shall have the same right of appeal, under the same rules and regulations as provided for in chapter one hundred and seventeen of the General Statutes: *provided*, that the attested copies and notices required to be given by said chapter shall be served upon such parties as the judge of probate shall direct.

Sect. 4. Upon the application of the overseers of the poor of any town, to the board of state charities, said board shall make provision in the state almshouses or elsewhere for the support of any persons heretofore known as Indians who may be unable to support themselves, and who have not acquired a settlement in any town; and upon the application of any Indian who has heretofore received aid from the Commonwealth, the said board shall furnish to such person in the state almshouses or elsewhere, such aid as they may deem expedient.

Sect. 5. The general agent of the board of state charities shall take charge of the house, and all property connected therewith, in the town of Webster, belonging to the Commonwealth, and may lease the same to persons heretofore known as members of the Dudley tribe of Indians, upon terms substantially like those upon which they have heretofore occupied it; or he shall, under the direction of the board of state charities, sell the same at public auction, and the proceeds of such leases or sale shall be paid into the treasury of the Commonwealth. [*Approved June* 23, 1869.

"C"

An Act to incorporate the town of Mashpee. *Chap.* 293

Be it enacted, &c., as follows:

District abolished and town of Mashpee incorporated.

Section 1. The district of Marshpee is hereby abolished, and the territory comprised therein is hereby incorporated into a town by the name of Mashpee; and said town of Mashpee is hereby invested with all the powers, privileges, rights and immunities, and subject to all the duties and requisitions to which other towns are entitled and subject by the constitution and laws of this Commonwealth.

Common lands, fishing rights, &c., transferred to town.

Section 2. All common lands, common funds, and all fishing and other rights held by the district of Marshpee, are hereby transferred to the town of Mashpee, and shall be owned and enjoyed as like property and rights of other towns are owned and enjoyed. Any lease held by any party of rights of fishing in Marshpee, made under authority of any law of this Commonwealth, shall continue in force according to the terms thereof, and the rent shall be payable to the treasurer of the town of Mashpee. The town of Mashpee shall succeed to all contracts, rights of action and liabilities of the district of Marshpee, and may sue and be sued in relation to the same.

Warrant to notify meeting for choice of town officers.

Section 3. Any justice of the peace of the county of Barnstable, may issue his warrant, directed to any principal inhabitant of the town of Mashpee, requiring him to notify and warn the inhabitants thereof qualified to vote in district affairs, to meet at the time and place therein appointed for the purpose of choosing all such town officers as towns are by law authorized and required to choose at their annual meetings, and said warrant shall be served by publishing a copy of the same in some newspaper printed in the county of Barnstable, and by posting up copies thereof, attested by the person to whom the same is directed, in three public places in said town, seven days at least before such time of meeting. Such justice, or in his absence, such principal inhabitant, shall preside until the choice of a moderator in said meeting.

At such meeting all inhabitants of said town heretofore qualified to vote in district affairs may vote, and the proceedings at such meeting shall be in accordance with the provisions of the act establishing the district of Marshpee.

Representative, senatorial, &c., districts.

Section 4. The said town shall be and form a part of the same representative, senatorial, councillor and congressional districts as the town of Barnstable until legally changed.

County commissioners may expend $300 annually for repairs of roads, and be reimbursed by state.

Section 5. The county commissioners of the county of Barnstable may, upon application of the selectmen of the town of Mashpee, expend a sum not exceeding three hundred dollars in any one year, from the funds of the county, for the construction and repair of roads within said town, and the sum actually expended shall be reimbursed from the treasury of the Commonwealth.

Court may order common lands to be divided, and appoint commissioners to make partition.

SECTION 6. Any justice of the superior court upon the application of the selectmen of the town of Mashpee, after such notice as the justice may direct to all parties interested and a hearing of the same, if he shall adjudge that it is for the interest of said parties that any or all of the common lands of said town, or of the people heretofore known as the Marshpee tribe of Indians, be divided, shall appoint three discreet, disinterested persons commissioners to make partition of the same, and their award, being approved by the court, shall be confirmed by decree thereof; but if he shall adjudge that it is for the interest of said parties that the same, or a part of the same, be sold, he shall direct the said commissioners, after they shall have given such bonds as the court may require, to proceed to sell at public auction any or all of said lands, and to pay the proceeds of the same to the treasurer of said town; and the said justice shall direct the said commissioners to examine and define the boundaries of the lands rightfully held by individual owners, and to properly describe and set forth the same in writing, and the title and boundaries so set forth and described being approved by the court, shall be confirmed by decree thereof; and the same, together with all deeds of partition, division or sale made by such commissioners, shall be recorded in the registry of deeds in the county, and the expenses of said commissioners, including the cost of recording said deeds, the same being approved by the court, shall be paid out of the treasury of the Commonwealth; the justice may receive the application aforesaid and order notice thereon in vacation as well as in term time, but such other proceedings before the justice as are herein provided for shall be had at a term of the superior court for the county of Barnstable.

Money for support of schools.

SECTION 7. All sums of money payable to the selectmen or treasurer of the district of Marshpee under chapter thirty-six of the General Statutes, for the support of schools, shall hereafter be paid to the treasurer of the town of Mashpee, to be expended in accordance with section four of said chapter.

This section shall continue in force for five years.

Approved May 28, 1870.

D-2

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

MASHPEE TRIBE, et al., Plaintiffs, v. JAMES G. WATT, et al., Defendants.	)	Civil No. 81-3205-S

ANSWER

... 33-34. The federal defendants admit that the United States has never terminated the Mashpee Tribe, their community or their Reservation ....

... Dated this 5th day of April, 1982.

Respectfully submitted,

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D-3

A Plume Briar
Size of Old Knife

A

REPORT

TO THE

SECRETARY OF WAR

OF THE UNITED STATES,

ON INDIAN AFFAIRS,

COMPRISING A NARRATIVE OF A TOUR

PERFORMED

IN THE SUMMER OF 1820, UNDER A COMMISSION FROM THE PRESIDENT OF THE UNITED STATES, FOR THE PURPOSE OF ASCERTAINING, FOR THE USE OF THE GOVERNMENT, THE ACTUAL STATE OF THE INDIAN TRIBES IN OUR COUNTRY:

ILLUSTRATED BY A MAP OF THE UNITED STATES; ORNAMENTED BY A CORRECT PORTRAIT OF A PAWNEE INDIAN.

BY THE REV. JEDIDIAH MORSE, D. D.
Late Minister of the First Congregational Church in Charlestown, near Boston, now resident in New-Haven.

NEW-HAVEN:

Published by Davis & Force, Washington, D. C.; Cushing & Jewett, Baltimore; W. W. Woodward, and E. Littell, Philadelphia; Spalding & Howe, and R. N. Henry, New-York; E. & E. Hosford, Albany; Howe & Spalding, New-Haven; O. Goodwin & Sons, Hudson & Co. O. D. Cooke & Sons, Hartford; Richardson & Lord, S. T. Armstrong, Lincoln & Edmands, Cummings & Hilliard, and O. Clark, Boston.

PRINTED BY S. CONVERSE.

1822.

that time, even after the numbers of the natives, during the preceding century, had been greatly reduced."*

In the gradual diminution, and final extinction, of these tribes, who were the terror of the early settlers, we have a melancholy specimen of what has happened in like manner to all the Indian tribes, who once inhabited the territory of New-England, except the few feeble remnants we have enumerated; and of hundreds of other powerful tribes, once spread over the settled parts of our country. And such will be the inevitable destiny of all Indians now mingled among our white population, if a radical change in our treatment of them, be not adopted.

Massachusetts.

All the Indians remaining in this State, reside on their respective Reservations at Marshpee, Herring Pond, Martha's Vineyard and Troy, in the south east part of the State, from fifty to one hundred miles from Boston. The State, by a Board of Overseers, exercises a guardian care over them, as to their lands, and civil rights and privileges; and the corporation of Harvard College, and "The Society for propagating the gospel among the Indians and others in North America," provide for their religious and moral instruction; each having charity funds in its Treasury, appropriated to the benefit of Indians, the former $12,000, the latter, $9,000. A stated missionary is supported at Marshpee, and another at the Vineyard, who, as they have opportunity, visit the other remnants at Herring Pond, and Troy.

No official census of these Indians has recently been taken. They are estimated in our table, at 750, viz; at Marshpee 320; Herring Pond, 40; Troy, 48; the remainder at Martha's Vineyard.

* Mr. Williamson is preparing a history of this State; and from our knowledge of the means he is employing to collect his materials, we anticipate from his pen, a correct and valuable work.

Their lands are held in common, and are unalienable, but with the consent of their overseers.* Some have gardens, and cultivate their lands to a considerable extent and advantage. The wood on their Reservations, pipe clay found on one of them at Martha's Vineyard, and pasturing the cattle of the white people, are sources of income. Many of the young men are employed in the whale and other fisheries, and shew much skill in their employments; and all have at their command, the means in abundance of living in comfort, and even in affluence, if they had but the knowledge, and the dispositions, to use them. Their infirm and aged poor, are considered as foreigners, and taken care of by the State. The Indians are not taxed; have no voice in elections, none of the rights and privileges peculiar to the citizens of the Commonwealth. In this, their state differs from that of the free negro population, who are taxed, and have the right of voting in elections, which many of them regularly exercise, and are eligible to the highest offices in the government; though other than *legal* obstacles, have prevented this sable race from receiving any of the civil honors, or offices of the state, or town, in which they reside.

The following are valuable and pertinent communications from missionaries residing among these Indians. In answer to questions forwarded to Rev. Mr. Fish, the worthy and intelligent missionary stationed at Marshpee, he writes me thus under dates of Feb. 1820, and Jan. 1821.

"I will answer your several inquiries as well as I am able.

1. As to the descent of the Indians of these parts, I believe it cannot be traced at this day. They have altogether adopted the habits of civilized life; of course, have forgotten their ancient names, and indeed their language also, with the exception of a very few individuals, who retain a slight knowledge of it, and are able to converse a little.

2. The number of *pure blooded* Indians is extremely small, say fifty or sixty, and is rapidly decreasing. The mixture of blood

* These overseers are appointed by the government of the State, and their duties are, as guardians of the Indians, to see that they are not mal-treated by the white people, and to advise them in the management of their affairs.

arises far more frequently from connexion with *negroes*, than with *whites*.

3. Professors of religion are considerably numerous. Perhaps there may be *fifty*: composed of Congregationalists and Baptists; a few of whom are eminently pious, considerable numbers decent in their lives, and not a few shockingly profligate. The number of men and women are perhaps nearly equal. The state of morals generally is low. Intemperance, with its concomitants, is found among them as with almost all Indians. They manifest a wish, however, to have their children instructed. Schools are maintained among them at the expense of the plantation; and though increased means of instruction would be desirable, there are few children, who are not taught to read and write.

4. Their territory comprises about 13,000 acres, worth on an average about four dollars an acre; held in joint stock (except what individuals choose to cultivate and enclose, which is theirs, not in fee, but only in tillage) guaranteed to them by the State, managed by a Board of Overseers, appointed by the Governor and Council, and rendered unalienable, except by legislative authority.

5. As to the plan of removing them, *were they in favor of the measure*, it would scarcely be an object. They are of public utility *here*, as expert whalemen and manufacturers of various light articles; have lost their sympathy with their brethren of the forest; are in possession of many privileges, peculiar to a coast, indented by the sea; their local attachments are strong; they are tenacious of their lands; of course, the idea of alienating them and removing to a distance, would be very unpopular. This is evident from the feelings manifested by those whom I have sounded on the subject; I have reason, therefore, to believe the scheme would not take with them.

6. As to the Indians of Marshpee, they are, I think, diminishing, though rather slowly. The proximate cause of diminution is their vices, occasioned, I conceive, chiefly by their concern in whaling, and their unavoidable connexion with whites, whose vices they imitate, particularly the sin which most easily besets Indians, an intemperate use of ardent spirits. If industrious and sober, they might live with the greatest comfort, and be respecta-

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Me. Their connexion with the State, and with those immediately superintending their affairs, is a very happy one, did they but know the things pertaining to their happiness.

7. At Herring Pond, there are not more than forty people of color. Their territory is considerable; but their affairs are embarrassed, and probably at no distant day, Government will see fit to dispose of their land, and perhaps remove them to Marshpee. I preach to them as often as one sabbath in six or seven. They are fourteen miles from this place. Both at Marshpee and Herring Pond, there is a public allowance from the State for schools. A large proportion of their children live in white families, as servants, and then the stipulation with their masters or mistresses always is, that they be taught to read and write, and frequently to manage domestic affairs, or the occupation of their master or mistress."

The Rev. Mr. Thaxter, the venerable minister of Edgarton, on Martha's Vineyard, writes thus, to Rev. Dr. Holmes, Secretary to the Society for propagating the Gospel among the Indians and others in North America.

"There was, early after the settlement of the Island, much pains taken by the *Mayhews* to Christianize the Natives. They were remarkably successful. The Natives of Gay Head made a grant of a large tract of land at Gay Head for the express purpose of obtaining instruction for themselves and their children."* After giving some account of their jealousies and disputes about this land, which they now consider as secure in their own hands, he observes: "Were they possessed of common prudence, such are the advantages they enjoy, they might contribute considerable to their own instruction. They are as jealous of one another, as they are of the white people. Those who have no children will not consent that their overseers shall apply any of their income for the instruction of the children of others. I consider the intruction

* This is a tract of land, probably granted by the Indians of this Island many years ago, to the Society in England, for propagating the Gospel in Foreign parts, to enable that Society to extend the means of instruction among our Indians. The revolutionary war interrupted their operations in this country, which have never since been renewed, and this valuable property, it seems, has reverted to the descendants of the Indians, who gave it.

of these poor creatures an object of importance. I have been acquainted with them for near forty years, and am fully persuaded, that schooling the children ought to be the first object; preaching to them the second. Farm Neck and Christian Town are trifling objects, compared with Gay Head and Chab-aquiddick.† I am often at Chab-aquiddick. They appear thankful for the instruction afforded them. I often admonish them to be attentive; that if they are not, I must report them to the Society, and then they will lose their instructor. They appear to feel it. It is true, we think we see but little good in preaching to these people; did we not take into consideration what evils we probably prevent, who would not be discouraged, and give up the cause, saying, I have labored in vain, and spent my strength for naught? Having put our hands to the plough, we must not look back."

Mr. Baylies, an active and successful Missionary on Martha's Vineyard, 1819, writes to Dr. Holmes: "In my visits (among the Indians on Martha's Vineyard) my feelings are often hurt. *The universal complaint is, "Our children are suffering for want of a school, and we are not able to support one. Can you help us?"* Women schools, superintended by a man, would be productive of great good." "In my schools I had one hundred and thirty-two scholars; one hundred and twenty-two were colored; eleven were married people. In all the schools, I should say, there were one hundred and fifty colored scholars, of both sexes. The Teachers of some of the schools were *colored* men and women. These schools are very pleasing to the Indians." Specimens of writing from seventy of the Indian scholars, left with the Secretary, do great honor to the schools, and furnish good encouragement to their continuance.

Mr. Baylies visited Troy, was well received by the Indians there, forty-eight in number. They have a decent house with two rooms, one for religious worship, the other for a school.

The Legislature of the State has recently granted three hundred dollars to the Indians at Chab-aquiddick, "to build a suitable house for public worship and a school." The house is built and dedicated. The effect on the Indians is happy, and the prospect of future benefit to them promising.

† An Island east of the Vineyard.

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The facts stated concerning the tribes above enumerated, shew the extent and value of several of their Reservations; evince the dispositions, both of the old and young, in regard to schools; the capacities of their youth to receive instruction; their relation to the government of the states in which they reside; their situation as to civil priviliges; their feelings on the subject of a division of their lands and having individual property; of removal from their present places of abode; in regard to the christian religion and its institutions; and the effects of their connexion and intercourse both with the white and black population around them. These results, of long experience, may be of much value to guide in forming plans, and devising measures, to preserve the remaining Indians from extinction.

Rhode-Island.

The only Indians remaining in this State are Narragansetts, at Charlestown, forty miles south-west of Providence, over against Block Island. This tribe, at the period of the first settlement of New-England, was one of the most numerous and powerful in all the country, and were long the terror of the English settlers, and of all the tribes around them. The territory which they occupied was extensive. As late as 1744, they were still so numerous, as that in a remarkable revival of religion, under Rev. Mr. Park of Westerly, sixty-four adults were baptized and received into the Church.* Now, their numbers are but four hundred and twenty-nine. Of these, twenty-two were denominated negroes; the rest are of Indian extraction, but are nearly all, if not every individual, of mixed blood and color, in various degrees and shades. Their territory is reduced to about three thousand acres, the joint property of the tribe, and is estimated to be worth about $50,000 or $60,000.

The Society for propagating the gospel among the Indians and others in N. America, support a missionary, and two schools of about fifty scholars, among these Indians, a part of the year.

* Prince's Ch'n. Hist. for 1744.

STATISTICAL TABLES.

No. I.—*A STATISTICAL TABLE of all the Indian Tribes within the limits of the United States, including a few bordering on our north and south boundaries, related to, or intermingling with them; exhibiting their names, the number of souls in each tribe, the places of their residence, with references to the map, and to the pages of this work, pointing to the places of residence of each tribe, on the one, and to the pages in the other, where they are described.*

	Refer. to Map.	Names of the Tribes.	No. of souls.	P. in rep. and app. each tri. is desc'd. Rep.	App.	Places of Residence and Remarks.
NEW-ENGLAND. Maine.	1	St. Johns Indians	300		84	On St. John's River, Menluctin Point, sixty miles above Fredericktown in N. Brunswick. Supposed to be a mixture of the Esquimaux, with other Indians and white people principally French.
	2	Passamaquoddies	379		65	Pleasant Point, on Scodic r. town of Perry, 5 m. N. of East Port.
	3	Penobscots	277		65	Indian Old town, Penobscot river, 12 m. above Bangor.
Massachusetts.	4	Marshpee	320		68	At Marshpee, 78 m. S. E. Boston, Barnstable Co.
	5	Herring Pond	40		do.	At Sandwich, 14 m. from Marshpee.
	6	*Martha's Vineyard	340		do.	Island on the S. coast of Mass. S. E. of Boston.
Connecticut. R. Isl.	7	Troy	50		do.	In Troy 50 m. S. Boston, Bristol Co.
	8	Narragansett	420		73	In Charlestown 40 m. S. W. of Providence.
	9	*Mohegan	200		74	In Montville, N. London, Co. between N. London and Norwich, on Thames river.
	10	Stonington	50		75	In Stonington, S. E. corner of Connecticut.
	11	Groton	50		do.	In Groton, adjoining Stonington.
		Total in New-England	2,525			
STATE OF NEW-YORK.	12	Montauk Indians	300		75	At Montauk Point E. end of Long-Island, N. Y.
	13	†Brotherton	400	24	76	Near Oneida Lake.
	14	†Stockbridge	438		77, 83	At New-Stockbridge, 7 m. S. of Oneida castle.
	15	†Oneidas	1,031		68	At Oneida castle near Oneida Lake.
	16	Tuscaroras	314		77	At Lewiston near Lake Ontario.
	17	Onondagas	220		323	In Onondaga Hollow, near Onondaga Lake.
	18	Senecas and Onondagas	597		77, 84 87, 93	On the Alleghany river, bordering on Pennsylvania.
	19	do. and Delawares	389		do.	At Cattaraugus, in the county of this name, do.
	20	do. do.	340		77, 84	At Tonewanta, between Batavia and Buffaloe.
	21	do. Cayugas, & Onondagoes	700		77, 84	At Buffalo 3 m. E. of Lake Erie.
		Senecas and a few of other tribes	456		do.	On 5 small Reservations on Genesee river and at Oil Creek.
		Total in New-York	5,184			

*The numbers in these tribes are conjectural; no particular account of them having been received.

†These tribes live within the antient limits of the Oneida Territory.

TABLE IV.—*The number of Schools established for the education of Indians.*

Names of the Tribes, and Schools.	Where located.	When commenced.	By whom—and by whom supported.	No. of scholars.	Allowance of the Gov. of U. States.	Page in Rep. & App. where described.	Remarks.
Passamaquoddies,	Perry, Maine.	About 1821.	Soc. for Prop. Gosp. among Indians N. Amer. & the state and town of Perry.	Not known.	None.	85 Ap.	
Marshpee Indians, Hering Pond, Troy,	Marshpee, Mass. Near Marshpee. Troy, Mass.	These Indians have had schools among them for many years.	By the plantation, the state, the Corporation of Harv. Col. & the Soc. for Prop. the Gospel among Indians of N. America.	Not given.	None.	68 to 71 do.	
Martha's Vineyard,	I. of Martha's Vineyard, Mass.	Early after the settlement of the Island by white people.	By the Mayhews—The state, Plantation, Corp. Harv. Col. & Soc. for prop. Gospel among Indians in N. Am.	150	None.	71	The schools here are t ught b men and women, w ite an colored.
Naragansetts,	Charlestown, R. I.	Many years ago.	For the last 8 or 10 yrs. principally by the Soc. for Prop. Gospel among Indians in N. Am.	50	None.	73	They have two schools.
Mohegans,	Mohegan.	Do.	Formerly by missionaries, latterly by the State.	But few.	None.	74	

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TABLE IV.—CONTINUED.

Names of the tribes and schools.	Where located.	When commenced.	By whom—and by whom supported.	No. of scholars.	Allowance of the Gov. of U. States.	Page of Rep. & App. where described.	Remarks.
Moors Indian School.	Dartmouth College, Hanover, N. H.	1754	Rev. Dr. Wheelock—Society in Scotland for propagating Chris. Knowl.	Suspended.	None.	App. 400.	This school was begun by Dr. Wheelock in Lebanon, Ct. and on the establishment of Dartmouth College, was removed and attached to this institution.
Cornwall,	Town of Cornwall, Con.	May, 1817.	The Am. Bd. Com. for For. Mis.	35	$1428	75 Rep 264 Ap	
Oneidas,	Oneida, N. Y.	Dec. 1829.	The Hamilton Baptist Soc. N. Y.	40 to 50.		88	These Indians have had missionaries & schools among them for many years, supported by the Soc. in Scotland for Propagating Christian Knowledge, Corp. Harv. Col. & Soc. for prop. the Gospel among the Indians, &c.
Stockbridge, of Mohegans,	New Stockbridge, N. Y.	Many years	Soc. in Scotland, & Soc. for prop. Gosp.				

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INDIAN TREATIES,

AND

LAWS AND REGULATIONS

RELATING TO INDIAN AFFAIRS:

TO WHICH IS ADDED

AN APPENDIX,

CONTAINING THE PROCEEDINGS OF THE OLD CONGRESS, AND OTHER IMPORTANT STATE PAPERS, IN RELATION TO INDIAN AFFAIRS.

PRINTED AND PUBLISHED UNDER ORDERS OF THE DEPARTMENT OF WAR OF THE 9TH FEBRUARY AND 6TH OCTOBER, 1825.

WASHINGTON CITY:

WAY & GIDEON, PRINTERS.

1826.

prove ment, for which they appear to be naturally eminently susceptible. To guard against this evil, so fatal to the race, there ought to be the strongest and the most solemn assurance, that the country given them should be their's, as a permanent home for themselves and their posterity, without being disturbed by the encroachments of our citizens. To such assurance, if there should be added a system by which the government, without destroying their independence, would gradually unite the several tribes under a simple, but enlightened system of government and laws, formed on the principles of our own, and to which, as their own people would partake in it, they would, under the influence of the contemplated improvement, at no distant day, become prepared, the arrangements which have been proposed would prove to the Indians and their posterity a permanent blessing. It is believed that, if they could be assured that peace and friendship would be maintained among the several tribes; that the advantages of education which they now enjoy would be extended to them; that they should have a permanent and solemn guarantee for their possessions, and receive the countenance and aid of the government for the gradual extension of its privileges to them, there would be among all the tribes a disposition to accord with the views of the government. There are now in most of the tribes, well educated, sober, and reflecting individuals, who are afflicted at the present condition of the Indians, and despondent at their future prospects. Under the operation of existing causes, they behold the certain degradation, misery, and even the final annihilation of their race, and no doubt would gladly embrace any arrangement which would promise to elevate them in the scale of civilization, and arrest the destruction which now awaits them. It is conceived that one of the most cheap, certain, and desirable modes of effecting the object in view, would be, for congress to establish fixed principles, such as have been suggested as the basis of the proposed arrangement, and to authorize the president to convene, at some suitable point, all of the well informed, intelligent, and influential individuals of the tribes to be affected by it, in order to explain to them the views of the government, and to pledge the faith of the nation to the arrangements, that might be adopted. Should such principles be established by congress, and the president be vested with suitable authority to convene the individuals so proposed, and suitable provision be made to meet the expense, great confidence is felt, that a basis of a system might be laid, which, in a few years, would entirely effect the object in view, to the mutual benefit of the government and the Indians, and which, in its operations, would effectually arrest the calamitous course of events to which they must be subject without a radical change in the present system. Should

Indians to be solemnly assured, that the country given them is to be permanently theirs.

System of government to be established.

The formation of effectual these views, if adopted, on the Indians.

Depopulation.

Plan for effecting the proposed arrangement.

President to be vested with authority to call a convention.

Additional sum of $23,000 required

it be thought advisable to call such a convention, as one of the means of effecting the object in view, an additional appropriation of 30,000 dollars will be required; making in the whole, 123,000 dollars to be appropriated.

For the said convention. Whole amount required, $123,000.

All of which is respectfully submitted.

J. C. CALHOUN.

To the PRESIDENT *of the United States.*

DEPARTMENT OF WAR,

Office of Indian Affairs, Jan. 10, 1825.

SIR: I have the honor, herewith, to submit, in compliance with your directions, a table containing a statement of the names of the Indian tribes now remaining within the limits of the different states and territories; the number of each tribe; and the quantity of land claimed by each.

Report of Mr. McKenney, referred to in the preceding report of Mr. Calhoun.

There is no land assigned, as will be seen on reference to the table, to the Indians in Louisiana; yet, it is believed, the Caddoes have a claim, but to what extent is not known. So, also, have the Cherokees, (whose numbers are not known,) to a tract in the northwest corner of the state of North Carolina; which, it is believed, does not exceed 200,000 acres. In New Jersey, Pennsylvania, and perhaps in Maryland, a few Indians are remaining, but how many, or what quantity of land is owned by them, if any, there are no means of ascertaining.

There are now remaining within the limits of the different states and territories, as is shewn by the table, sixty-four tribes and remnants of tribes of Indians, whose "names" and "numbers" are given: who number, in the aggregate, 129,266 souls; and who claim 77,402,318 acres of land.

It will be seen by adverting to the table, that the Indians residing north of the state of Illinois, east of the Mississippi, and west of the lakes, are comprehended in the estimate of the number in Michigan territory; although, in estimating the quantity of land held by Indians in that territory, the portion, only, so held in the peninsula of Michigan, is estimated. It was found impossible, from any documents in possession of this office, to distinguish the number of Chippeways and Ottawas residing in the peninsula of Michigan from those residing on the west side of Lake Michigan. It is, however, believed, that the whole number residing in the peninsula, does not exceed 2,500; and these, as has been stated, are principally of the Chippewa and Ottawa tribes.

It may be proper also to remark, that of the 9,400 Sacs and Foxes who are included in the estimate as part of the 129,266; and who occupy lands on both sides the Mississippi, not more

than one-th rd of that number are supposed to reside on the east side; a d, of the 5,200 Osages, who, by the table, are assigned to M ssouri and Arkansas, it is believed, not more than one-third of that number reside within the state of Missouri and territor · of Arkansas. If, therefore, the number assumed for the p ninsu'a of Michigan, be correct, and two-thirds of the Sacs and Foxes, as is believed to be the fact, reside on the west of the Missi sippi; and two-thirds of the Osages west of Missouri, a I nor h of Arkansas, there will remain "within the limits o the different states and territories,"—confining the Michiga territory to the peninsula—97,381 Indians, possessing, (if t e 200 000 acres, which are believed to be claimed by the Cher kees in North Carolina, be added,) 77,602,318 acres of land

In obtain ng th's information, resort has been had, for the "names" an l "numbers" of the Indian tribes, to the reports to this office, and to other sources of information which are deemed to be the most accurate; and, for the quantity of land claimed by them, to the files of this office; to the general land office; a nd to computations carefully made from the best maps, by Col. Roberdeau, of the topographical bureau.

The 4,000 000 of acres assumed as the quantity claimed by the Cherokees in Arkansas, although but an estimate, is believed to be nearly correct. The precise quantity, however, cannot be ascertained, until it is known how much they ceded on this side the Mississippi, for which, by the treaty of 1817, they are to receive an equal number of acres on the other.

I have the honor to accompany this with a note from Col. Roberdeau, in relation to the difference between his estimate of last year, of the lands claimed in Georgia, and his recent corrected computation of them.

I hav: the honor to be, very respectfully.

Your most obedient servant.

THOS. L. McKENNEY.

To the hon. the secretary of war.

TOPOGRAPHICAL BUREAU.

January 10th, 1825.

Estimate of the quantity of lands owned by the Cherokees and Creeks in Georgia.

The quantit: of land in the state of Georgia, not ceded to the United St tes by Indians, was, last year, reported at 10,240,000 squar acres; upon a review of the calculations, and having more correct documents than were then referred to, the whole quantity in the state appears to be 9,537,920 acres, of which 5,292,160 are of the Cherokees, and 1,245,760 of the Creeks, as nearly as can be computed.

I. ROBERDEAU,

Lt. col. Top. Engineers.

Col. Thos. L. McKenney.

Indian department.

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STATEMENT, showing the Names and Numbers of the different Tribes of Indians now remaining within the limits of the several States and Territories, and the quantity of land claimed by them respectively.

Names of the tribes.	States or territories in which located.	Numbers of each tribe.	Number in each state or territory.	Number of acres claimed by each tribe.	REMARKS.
St. John's Indians	Maine	500			No information as to their lands.
Passamaquoddies	do	379		100	
Penobscots	do	277		92,160	
			956		
Marshpee	Massachusetts	320			All the Indians in this state reside on their respective reservations, at the places by which they are designated. The quantity of land occupied by them is not known, nor is there any information in this office by which it can be ascertained.
Herring Pond	do	40			
Martha's Vineyard	do	340			
Troy	do	50			
			750		
Narragansett	Rhode Island		420	3,000	
Mohegan	Connecticut	200		4,000	
Stonington	do	50		300	
Groton	do	50			No information as to their lands.
			400		
Senecas	New York	2,328			
Tuscaroras	do	252			
Oneidas	do	1,106			
Onondagas	do	448			These Indians own and possess together seven reservations of land, containing in the whole, according to the report of the agent, on file in this office, about the number of acres stated.
Cayugas	do	90		246,673	
Stockbridge	do	273			
Brotherton	do	269			
St. Regis Indians	do	560			
			5,145		
Nottaways	Virginia		17	27,640	
Catawbas	S. Carolina		430	144,000	

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STATEMENT—Continued.

Names of the tribes.	States or territories in which located.	Numbers of each tribe.	Number in each state or territory.	Number of acres claimed by each tribe.	REMARKS.
Ihoways	Missouri	1,100			No information as to the lands claimed by these Indians.
Osages	Missouri & Arkansas ter.	5,200		7,401,920	The Osages reside chiefly in Missouri [illegible] portion west of both. Of the lands stated as claimed by them, 2,707,920 acres are in the former, and 782,920 acres in the latter. No information as to their lands.
Pianksheaws	do	207			
Cherokees	[illegible] ter.	6,000		4,000,000	The Cherokees claim about this quantity of land in this territory, under treaties of 1817 and 1819; the precise quantity not yet ascertained.
Quapaws	do	700			These Indians have recently sold out all their claim, and are about to remove beyond the limits of the territory.
Choctaws	do			8,858,560	Very few or none of this tribe reside in the territory; but they claim in it the quantity of land stated under the treaty of 15th Oct. 1820.
			13,917		

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RECAPITULATION.

States and territories.	Whole number of Indians.	Whole quantity of land claimed. Acres.	REMARKS.
Maine	936	94,000	
Massachusetts	750		
Rhode Island	420	3,000	
Connecticut	400	4,300	
New York	5,143	216,675	
Virginia	47	27,000	
N. Carolina	450	144,000	
Ohio	2,230	409,501	
Michigan terr.	28,316	7,057,920	The number of Indians embraces those in the country west of Lake Michigan, as well as those in the peninsula of Michigan; the information being such as not to admit of a separate enumeration.
Indiana	11,379	10,104,000	Some of the Indians claiming lands in these states reside partly in both; the particular number in either cannot therefore be stated.
Illinois		3,214,560	
Georgia		9,527,930	
Alabama	53,025	7,[illegible]5,576	The Indians claiming lands in these states, do not all reside in any one of them, except the Chickasaws; and it cannot therefore be stated what is the particular number residing in each state.
Tennessee		1,[illegible]53,920	
Mississippi		13,[illegible]43,680	
Florida terr.	5,000	4,032,640	
Louisiana	1,313		
Missouri	18,917	2,782,720	The Osages and Pianksheaws are scattered in Missouri and Arkansas, and most of the former beyond the limits of either; it cannot therefore be stated what is the particular number of Indians in either.
Arkansas terr.		12,812,280	
	129,386	77,[illegible]81,216	

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DEPARTMENT OF WAR, Office Indian affairs, Jan. 16, 1828.
THOS. L. M'KENNEY.

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23d CONGRESS, 1st Session. [Rep. No. 474.] H. OF REPS.

RECOGNITION

REGULATING THE INDIAN DEPARTMENT.

[To accompany bills H. R. Nos. 488, 489, & 490.]

MAY 20, 1834.

Mr. H. EVERETT, from the Committee on Indian Affairs, made the following

REPORT:

The Committee on Indian Affairs, to which was submitted so much of the President's message as relates to Indian affairs, &c., submit the following report, to accompany the bills by them reported, entitled,

"A bill to provide for the organization of the Department of Indian Affairs."

"A bill to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." And,

"A bill to provide for the establishment of the Western Territory, and for the security and protection of the emigrant and other Indian tribes therein."

The various subjects submitted to the committee, during the present session, have forced upon their consideration the present state of our Indian affairs, in its three principal relations—the organization of the department; the regulations of trade and intercourse; and the obligations of the United States to the emigrant tribes. These relations, though subjects of different bills, are intimately connected. They are parts of a system; and of a system which is, itself, also, intimately acquainted with the general legislation of the country. They have, therefore, deemed it proper to present, in the same report, their views on the subjects embraced in the several bills.

The committee are aware of the intrinsic difficulties of the subject—of providing a system of laws and of administration, simple and economical, and, at the same time, efficient and liberal—that shall be suited to the various conditions and relations of those for whose benefit it is intended; and that shall, with a due regard to the rights of our own citizens, meet the just expectations of the country in the fulfilment of its proper and assumed obligations to the Indian tribes. Yet, so manifestly defective and inadequate is our present system, that an immediate revision seems to be imperiously demanded. What is now proposed is only an approximation to a perfect system. Much is necessarily left for the present to Executive discretion, and still more to future legislation.

The Indian country, to which the bills reported refer, will include all the territory of the United States west of the Mississippi, not within Louisiana,

[Gales & Seaton, print.]

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TABLE 3.—*The tribes east of the Mississippi, and below N. lat. 46°, who have not yet agreed to remove west of the Mississippi.*

Names.		Numbers.	Remarks.
Indians of New England		2,526	
" New York		5,774	
" Virginia		47	
" South Carolina		450	
Tribes. Wyandots, O.		527	
" Ottawas, O.		250	
" Miamies		1,100	
" Menomonies		2,143	
		12,817	
" Chippewas, M. T.		3,000	These Indians have been provided with a home west of the Mississippi, when they choose to remove to it.
" Ottawas, do			
" Winnebagoes		4,591	
" Cherokees, east, in the States of Tennessee, North Carolina, Georgia, and Alabama		10,000	
	Total,	30,408	

TABLE 4.—*This table exhibits a summary and digest of what has been presented in the preceding tables.*

Tribes.	Numbers.	Square miles.	No. of acres.
Indigenous tribes west of Missouri	22,496	49,220	31,500,800
Indigenous tribes north of Missouri and their lands, including the Winnebago country	5,602	17,652	11,304,000
Emigrant Indians	25,837		
The Indians who have agr'd to emigrate, or submit to State laws	41,466	83,603	53,506,000
The Indians that have lands assigned them west of the Mississippi, but have not yet agreed to remove to them	17,591		

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TABLE IV—Continued.

Tribes.	Numbers.	Square miles.	Acres.
The Indians in the several States who have not yet agreed to remove, and to whom no lands have been assigned - - -	12,817		
Unappropriated lands west of Missouri and W. long. 17° 30′ to 23° - -	-	52,777	33,771,180
Unappropriated lands north of the State of Missouri	-	1,680	1,075,200
	125,806	201,342	128,859,280

The estimates in the foregoing tables are made up from the best sources of information. As it respects the number of souls in the different tribes, it will probably be found too high rather than too low, as the Indians generally have been greatly overrated. The quantity of land stated to belong to them, in cases of the emigrant Indians, is fixed by treaty stipulations, and therefore, accurately given; that of the indigenous tribes is only a general estimate, but it is believed it will fall within rather than overrun the real quantity claimed by them.

From the exhibit as presented by the tables, it appears that the whole number of Indians intended to reside in the Indian territory, (should all below N. lat. 46° remove from the east to the west of the Mississippi,) will amount to 125,806 souls; and the quantity of land set apart for them is 201,342 square miles! that is, more than one and a half square mile to every soul. And even the emigrants have assigned to them a country, equal, on an average, to a square mile for every individual. So that it is presumed there can be no question but that they have a sufficient quantity secured to them for their accommodation.

The commissioners accompany this report with a map of the Indian country; which, although it may not be found perfectly accurate, yet it is more so than any other published, and will serve to exhibit the relative position of the several nations, and the boundaries of their respective countries. In the appendix, C, will also be found a particular description of the boundary lines of their lands, with a few general remarks concerning them. The above description and the map will point out where the unappropriated land, amounting to 54,451 square miles, is situated; and the commissioners will now suggest how it can be disposed of, in order to accommodate those Indians still east of the Mississippi for whom no provision has yet been made, or any others whom it may, hereafter, be deemed important to settle on the Missouri river.

The lands from Red river to the north line of the Osage, Quapaw, and Seneca countries, have all been assigned; and the first district of unappropriated lands is between this line and the lands of the Weas, Shawnees, and Kanzas, and is estimated to contain 20,252 square miles, or

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HISTORICAL

AND

STATISTICAL INFORMATION

RESPECTING THE

HISTORY, CONDITION AND PROSPECTS

OF THE

INDIAN TRIBES of the UNITED STATES.

Collected and prepared under the
direction of the BUREAU OF INDIAN AFFAIRS per act of Congress
of March 3rd 1847.

BY HENRY R. SCHOOLCRAFT L.L.D.

Illustrated by
S. EASTMAN, CAPT. U. S. ARMY.

MASSACHUSETTS STATE LIBRARY.

Published by authority of Congress.

Part I.

PHILADELPHIA:

LIPPINCOTT, GRAMBO & CO.

7. ULTIMATE CONSOLIDATED TABLES OF THE INDIAN POPULATION OF THE UNITED STATES.

Names of Tribes.	Number in Tribe.	Total Population.
TABLE I.—Tribes whose Vital and Industrial Statistics have been taken by Heads and Families, under the direction of the Act of Congress.		
A. Iroquois Group	5,922	
B. Algonquin Group*	17,197	
C. Dacota Group*	6,570	
D. Appalachian Group*	5,015	
		34,704
TABLE II.—Tribes of the new States and Territories South and West, including the Acquisitions from Mexico under the Treaty of Guadalupe Hidalgo.		
A. Indian Population of Texas	24,100	
B. Indian Population of New Mexico	92,130	
C. Indian Population of California	32,231	
D. Indian Population of Oregon	22,733	
E. Indian Population of Utah	11,500	
F. Indian Population of Florida	348	
		183,042
TABLE III.—General Schedule of the Tribes located East of the Rocky Mountains and the Line of the Mississippi, in high northern latitudes; all of whom, together with those named in Table No. 2, remain to be enumerated, under the operation of the Indian Census in progress.		
Alabamas. (See *Muskogees.*)		
Assinaboins, south of lat. 49°	1,000	
Apaches. (See *Texas, New Mexico,* and *Utah.*)		
Arapahoes	3,500	
Absarokes, or Crows	4,000	
Aurickarees	1,500	
Blackfeet	15,000	
Blood Indians (few reach the Missouri)	500	
Brothertons	600	
Cherokees	26,000	
Creeks	25,000	
Chickasaws (not enumerated)	5,000	
Choctaws	16,000	
Comanches. (See *Texas.*)		
Cheyennes	2,500	
Carried forward	98,600	217,746

Names of Tribes.	Number in Tribe.	Total Population.
Brought forward	98,600	217,746
Caddoes	2,000	
Chippewas. (See *Algonquin Group.*)		
Chippewas, west, and Red River, north	1,500	
Crees. (None in the United States.)		
Chawas. (See *Cheyennes.*)		
Cayugas. (See *Iroquois Group.*)		
Cayugas and Iroquois, west	30	
Diamondallies. (See *Wyandotts.*)		
Dacotas. (See *Sioux.*)		
Delawares	1,500	
Eutaws. (See *Utahs.*)		
Foxes and Sacs	2,100	
Folle Avoines. (See *Menomonies.*)		
Florida Indians. (See Table 2.)		
Flatheads. (See *Oregon.*)		
Grus Ventres	3,000	
Green Bay Indians. (See *Menomonies* and *Oneidas.*)		
Iowas. (See *Dacota Group.*)		
Kiowas	2,000	
Kickapoos	600	
Kaws	1,600	
Kaskaskias	200	
Menomonies	2,500	
Mandans	300	
Minitarees	2,500	
Miamies	500	
Missouris	500	
Mohawks. (See *Iroquois Group.*)		
Munsees	200	
Ottowas. (See *Algonquin Group.*)		
Ottowas, west	300	
Otoes	500	
Omahas	2,000	
Oneidas. (See *Iroquois Group.*)		
Onondagas. (See *Iroquois Group.*)		
Ogallahs	1,500	
Pawnees	17,000	
Poncas	700	
Pottawatomies	3,200	
Peorias	150	
Piegans. (See *Satsika, Blood,* and *Blackfeet.*)		
Piankeshaws	200	
Carried forward	145,480	217,746

* The census, in these groups, has been carried no farther, but is in progress.

Names of Tribes.	Number in Tribe.	Total Population.
Brought forward	145,480	217,746
Quappas	400	
Ricarees. (See *Aurickarees.*)		
Shawnees	1,600	
Sioux of the Mississippi (not enumerated in No. 1)	9,000	
Sioux of the Missouri (not enumerated in No. 1)	5,500	
Soniks (See *Blackfeet*, &c.)		
Stockbridges	400	
Senecas. (See *Iroquois Group.*)		
St. Regis Tribe. (See *Iroquois Group.*)		
Seminoles	1,500	
Senecas and Shawnees. (See *Iroquois Group.*)		
Swan Creek and Black River Chippewas (not enumerated in Algonquin Group)	200	
Snakes. (See Table 2.)		
Shoshonees. (See Table 2.)		
Tetans	3,000	
Tonewandas. (See *Iroquois Group.*)		
Utahs. (See Table 2.)		
Wyandots. (See *Iroquois Group.*)		
Winnebagoes. (See *Dacota Group.*)		
Weas	250	
Yanktons. (See *Sioux of the Missouri.*)		
		167,330
TABLE IV.—Fragmentary Tribes still existing within the Boundaries of the old States.		
MAINE—		
Souriquois of St. Johns	300	
Passamaquoddies	379	
Penobscots	277	
	956	
Carried forward		385,076

Names of Tribes.	Number in Tribe.	Total Population.
Brought forward	956	385,076
MASSACHUSETTS—		
Marshpee		
Chippaquadic		
Christiantown		
Gay Head		
Assonets of Troy or Fall River.		
Herring Pond	847	
Hassanamico		
Punkapog		
Natic		
Dudley		
Grafton		
Yarmouth		
[All mixed with the African race but 8 or 10.]		
RHODE ISLAND—		
Narragansetts	420	
CONNECTICUT—		
Mohegans at Mohegan	300	
Mohegans at Stonington	50	
Mohegans at Groton	50	
NEW YORK—		
Iroquois. (See *Iroquois Group.*)		
Algonquins, not enumerated in Algonquin Group	40	
VIRGINIA—		
Nottoways, mixed with the African race	40	
SOUTH CAROLINA—		
Catawbas	200	
NORTH CAROLINA—		
Catawbas	250	
Cherokees. (See Table 1.)		
Total in old States	3,153	3,153
Grand Total		388,229

[There may, in addition to these numbers, be from 25,000 to 35,000 Indians, within the area of the unexplored territories of the United States.]

HENRY R. SCHOOLCRAFT,

Agent Census, &c., Act of March 3, 1847.

APPROVED,

L. LEA,

Commissioner Indian Affairs.

OFFICE INDIAN AFFAIRS,
JULY 22, 1850.

D-7

SENATE..... .....No. 96.

REPORT

TO THE

GOVERNOR AND COUNCIL,

CONCERNING THE

Indians of the Commonwealth,

UNDER THE ACT OF APRIL 8, 1859.

By JOHN MILTON EARLE,
COMMISSIONER.

BOSTON:
WILLIAM WHITE, PRINTER TO THE STATE.
1861.

Commonwealth of Massachusetts.

EXECUTIVE DEPARTMENT, COUNCIL CHAMBER,
BOSTON, March 9, 1861.

To the Honorable the House of Representatives:—

I herewith transmit for the information of the General Court, the Report concerning the Indians domiciled in this Commonwealth, made by the Commissioner appointed in accordance with the provisions of chapter 266 of the Acts of the year 1859.

JOHN A. ANDREW.

with even paternal solicitude, counselling them in their need, adjusting disputes between them and their white neighbors, and between each other, with many other acts of kindness of various kinds, for all which, he has constantly refused any compensation from them. This unselfish kindness has endeared him to them, and won their entire confidence, so that he has an influence with them that none other can possess, and, when he is gone his memory will be cherished as a benefactor, and none, it is feared, will be left to fill the place vacated by him.

Since my Report was completed, I have ascertained that the annual grant of sixty dollars to the Gay Head school for five years, expired in 1859, and, believing that the reasons which prompted its first appropriation have acquired increased force, and will commend themselves to the legislature, I have reported a resolve for extending the grant for another term of ten years.

MARSHPEE TRIBE.

The District of Marshpee, the residence of the largest distinct body of the descendants of the Indians, now remaining in the State, is situated on Cape Cod, in the westerly part of Barnstable County, and is bounded on the north by Sandwich and Barnstable, on the east by Barnstable, on the west by Falmouth, and on the south by the waters of the Vineyard Sound. The whole number of the tribe, so far as is ascertained, is 403.

Families,	93
Males,	186
Females,	216
Unknown,	1
Natives,	371
Foreigners,	32
Under 5 years of age,	50
From 5 to 10 years of age,	44
" 10 to 21 years of age,	97
" 21 to 50 years of age,	146
" 50 to 70 years of age,	46
Of 70 and over,	20

Of those who are 70 or over, six are 70 years old, one is 71, one is 74, four are 75, three are 76, two are 77, one is 87, and two are each 93 years of age. The two oldest persons are Lois Pells and Betsy Smith, both widows.

It appears by a statement made before a committee of the legislature in 1834, by Hon. Benj. F. Hallett, counsel for the tribe, that their population in 1767 was two hundred and ninety-two; in 1771, it was three hundred and twenty-seven, of whom fourteen were negroes, married to Indians; in 1832 it was three hundred and fifteen, of whom sixteen were negroes. By the commissioners' report in 1849, it was three hundred and five in 1848, of whom twenty-six were foreigners, all negroes or mulattoes; in 1859, the tribe numbered, as will be seen by this report and the accompanying tabular list, four hundred and three, including thirty-two foreigners, married to natives of the tribe, all negroes or mulattoes, or various mixtures of negro, Indian, or white blood—none of them being pure whites. Sixty-six, out of the whole number of the tribe, at the time of the enumeration, were not residents of the District; but fifty-two of them were considered as retaining their rights in the tribe, and more than half of the sixty-six were understood to be only temporary residents abroad, expecting, at some time, to return to Marshpee, and make it their permanent place of residence. A few others, as a matter of personal convenience, are now residing just over the line, and are so returned, but they consider themselves as identified with the tribe in all respects, and are so considered by the tribe. Fourteen individuals, included in the above sixty-six, whose names are in the "Supplementary List," own no land in the District, but have been gone so long from it, that they are not now recognized by residents as members of the tribe.

In this tribe, as in several of the others, the mortality, within the eleven years preceding, and including the autumn of 1859, was very great. The commissioners' list made in 1848 gives the names of three hundred and five persons, and of these, ninety-two, or 30 per cent. of the whole number were dead in 1859. The number of births during that period, and of deaths of those born within the time, are not known. But there were one hundred children living in 1859, who had been born since the commissioners' report, being an excess over the deaths of only eight. The additional excess in numbers, of the present

return over that of 1849, consists of persons whose names are not on that return. It is much to be regretted that no provision exists for a registration of the Indian tribes. This is a manifest defect in our law. The value of statistics consists chiefly in their accuracy and completeness, and it seems strange, when so much pains has been taken to perfect our system of registration and to publish the results, that this portion of it should have been overlooked or neglected. It is necessary to the completeness of the system, and if extended to the several tribes, would be valuable, as affording the means of interesting comparisons of the vital statistics of the tribes with those of the other people of the State, and would be an essential aid in any future investigations into their condition, &c. It is therefore earnestly recommended that the registration, in some form, should be extended to all the tribes.*

The whole District of Marshpee has an area of over sixteen thousand acres, comprising

Indian lands held in severalty, acres,		10,231½
" (upland), in common,		2,300½
" Parsonage,		450
" Cedar swamps,		250
" Salt and fresh meadows,		150
Total Indian lands,		13,382
Marshpee and Wakeby Ponds, acres,	850	
John's Pond,	350	
Cotuit, or Santuit Pond,	250	
Ashumete Pond,	200	
Aggregate area of these ponds,	——	1,650
Land held by whites, estimated at		700
Roads, rivers, and small ponds,		400
Whole area, acres,		16,132

A large proportion of the District is light, sandy, and barren, nearly destitute of water, and is of little value except for wood-

* Rightly construed, the Registration Law probably applies as well to Marshpee as to other portions of the State; but it does not appear to be so understood by the officers of the District.

land; and the growth of wood is comparatively small and stinted. Formerly, most of it was covered with a growth of wood, which, if it had been properly husbanded, would have been an unfailing source of revenue to the tribe, sufficient to place them beyond the reach of want for the support of their poor and all other municipal purposes, and would, beside, have given all the inhabitants an adequate supply of fuel; but, by the Act of March 2, 1842, provision was made for the division and distribution of this domain, so that each legal adult proprietor, male or female, each of the children of such proprietors, and every person of Indian descent, who was born within Marshpee, or within the counties of Barnstable or Plymouth, and who had resided, or whose parents had resided in Marshpee for twenty years or upwards, previous to the Act of 1834, by which the District was constituted, should receive sixty acres of land in severalty, including what each proprietor had previously occupied. The provisions of this Act were substantially carried out in the division which ensued. A large proportion of the land, thus divided, was covered with wood, as already indicated. An idea of its value may be formed, from the fact, that the wood on the parsonage lot, containing only four hundred and fifty acres, was sold in 1845, and the sum of $6,950 was realized from the sale, averaging over fifteen dollars an acre for the whole lot. Almost the whole of the wood that was standing on the land, when it was divided, is gone, and the people have nothing to show for it. The noble patrimony has wasted away, and the whole property of the District, real and personal, would not sell for as much money, now, including buildings and improvements, as the wood on the land was worth when it was divided; and it is doubtful whether a large proportion of the families are as comfortably situated, as well provided for, and in as good a condition to meet their future wants and necessities, as they would have been, had no more been divided to each, than would be sufficient for cultivation and to give them a suitable supply of fuel for their own use. Relying on the sale of their wood, to procure whatever they might want, agriculture was neglected, idle and improvident habits were acquired, and a general unthriftiness ensued, that pervaded the whole District. The marks of this are strikingly apparent at the present day, exceeding any thing of the kind to be found

on either of the other plantations, with perhaps the single exception of the few families on the Fall River reservation. The new growth of wood, which was coming up on most of the allotments, as well as that on the parsonage lot, which had attained considerable size, has, to a great extent, been destroyed by fires that have, within two or three years, burnt over about five thousand acres of woodland in the District. This calamity falls with peculiar severity on several widows with dependent families, to whom this was almost their only resource. The lesson which the people are now taking is a severe one, but it may be worth its cost, and, if it shall teach them wisdom for the future, they will not have suffered in vain.*

It will have been seen, that sixteen hundred and fifty acres, or more than one-tenth of the whole District, is occupied by ponds of fresh water, without including some of minor size. These afford fine fishing, and are a source of some public

* At the present day, and in the light which subsequent events have thrown on this matter, it is difficult to imagine what influences could have operated on the legislature, to induce it to sanction such an Act, as that which authorized the distribution of the Marshpee lands, or how it could have failed to perceive what consequences must almost inevitably flow from it. Here was a people held in a state of pupilage, under a *quasi* guardianship, forbidden by law to transfer a foot of their land to any but a proprietor of the District, without authority of the legislature—not allowed, even in their collective capacity, by a vote of the whole body, to appropriate a dollar for any public purpose, without the consent of the commissioner—a people, who, by being subjected so long to these restrictions and disabilities, had, to a great degree, lost self-respect and self-reliance, and become, from disuse, unaccustomed to pecuniary responsibility, or the proper management of prudential concerns. Under this law, nearly every married couple among them received one hundred and twenty acres of land, with sixty acres more for each and every child they had; and thus a property was at once placed at their disposal, in the wood growing on the land, of many times the value of the naked land, which the law did not permit them to sell. Without any training to a prudent forecast, having never had the opportunity of acquiring the habit of husbanding their resources; and, accustomed, as they were, to live from hand to mouth, this looked to them like a fund that could never fail, and it is not strange that even the best of them should yield, to some extent, to the temptation to rely on that, rather than their own efforts, for a living, and that the neglect, waste and improvidence ensued, which they have so much reason to deplore. Yet, in truth and justice, we are bound to say, that they, who had the power to prevent it and yet authorized it to be done, are more inexcusable, than are the unfortunate sufferers of the folly.

revenue. Marshpee and Wakeby Ponds are substantially one, being united by a very broad, deep strait, and present one of the finest sheets of fresh water to be found in the State. Situated in a sandy region, with but little soil or vegetable matter washed into them, to make mud or sediment, much of the shore, for a considerable distance into the water, is nearly a pure white sand and gravel, and the water of such remarkable purity and clearness, as to render every thing distinctly visible at the bottom, almost as much as if there was no water there. Being almost entirely supplied by springs, the water is of a very equable temperature both in summer and winter, and affords a congenial home for large quantities of the finest trout that can any where be found. At the outlet, a stream, sufficiently large to operate a mill, is constantly discharged. This finds its way to the sea, a distance of some eight or ten miles, over a bed of the same kind of sand and gravel as that of which the shores of the ponds are composed. Most of the way, the stream is somewhat rapid, with occasional quiet pools, affording to the trout a desirable and agreeable egress from the ponds to the sea, which is their principal feeding-ground. Here they become very fat, and attain an enormous size, often weighing from three to six pounds, and sometimes reaching eight or ten pounds. No other trout in the market are considered equal to them, or command so high a price. In their passage to and fro, between the ponds, which are their place of residence, and the sea, where they take their meals, the little river is alive with them throughout its whole course, and the sport, thus afforded to the fishermen, is indescribably fine. This fishery is a perquisite of the tribe, and no other person is allowed to fish in the stream without a permit from the proper officer, for which permit a fee of five dollars a day is required for each person. The amount received from the sale of these permits varies from one hundred and fifty to three hundred dollars a year. Between the times of my first and second visit to the District, two young men from a neighboring town obtained permits for two days, during which time they caught over one hundred and seventy pounds of these fine trout, realizing, at a low market value, two or three times the amount paid for their permits. The pickerel fishery, in the ponds, is also very good, and this, too, is a source of some revenue to the tribe. The herring

fishery, during its season, is usually abundant, the river and ponds being a favorite resort for them, and, though it brings no public revenue, it is a source of some private emolument, and furnishes a liberal supply of a favorite and convenient article of provision, for the use of all the families who choose to avail themselves of it, throughout the year. The season of 1859 was as good as usual, though the run was generally small at other places in that region.

The extensive tracts of woodland, here, reaching into Sandwich and Barnstable, and perhaps into Plymouth, afford a home and shelter to considerable numbers of deer, this being the only place in the State, except perhaps Naushon Island, where they have never been exterminated. The hunting of them has heretofore been a subject of legislative enactment, and, now that the destruction of the wood by fire on so extensive a tract, has circumscribed their range, and, in the same proportion increased the facilities of the huntsman for pursuing them, it is much to be feared, that, without some stringent statutory provision for their protection, they will at no very distant day become extinct in this region.

By the Act of 1834, constituting Marshpee a District, the organization is similar to that of towns, the proprietors electing their clerk, selectmen, (who are also overseers of the poor, surveyors of highways, and school committee,) and one or more constables, and voting the amount necessary for the support of the poor and their medical attendance, the repair of highways, the support of schools, and other necessary District charges. These several officers have duties corresponding to those in towns. In addition to these officers, it provided that there should be a commissioner, appointed by the governor and council, who must be a resident of Barnstable County, in the vicinity of the District, whose duty it was "to exercise a careful supervision over the affairs of said District" and to preside at all meetings of the proprietors, with the powers of moderator. All rules and regulations for the management of the public domain, and all appropriations for any public purpose, must receive his sanction to make them valid. By virtue of his office, he was treasurer of the District, and of the Herring Pond Indians, and, as such, was required to give bonds to the satisfaction of the governor and council for the faithful performance of his trust. He was

also required to report annually to the governor and council, for final settlement, an account of the receipts and disbursements of the treasury, with his own charge for necessary services, countersigned by the selectmen of the District, with their approval or disapproval of the same. By the Act of 1853, (chap. 186,) the office of Commissioner of Marshpee was abolished, and the office of Treasurer of Marshpee was established, to be also treasurer of the Herring Pond Indians, and he was required annually to report to the governor and council for settlement, an account of all receipts and disbursements, to be countersigned by the selectmen of Marshpee, and some person appointed by the Herring Pond Indians for the purpose, with their approval or disapproval of the same. By the same Act, the District was authorized to choose its own moderator, and to select its own officers, for the performance of all the duties heretofore devolving on the commissioner, so that it now enjoys all the rights of towns, except that of representation and the election of its treasurer.

The Act of 1842 empowers the proprietors to assess taxes for the purposes of the District, but the provision is practically nugatory, for the want of power to enforce their collection. The experiment, when tried, has utterly failed and had to be abandoned. About one-half of the residents paid their taxes, and the remainder refused or neglected to do it, and, as there was no power to levy on the land and sell it for the taxes, there was no remedy. When the public hearing was held at Marshpee, a strong feeling prevailed in favor of a grant of the necessary power for this purpose. But it is not seen how it could be exercised, consistently with the settled policy of the State in reference to the Indians, as, by existing laws, none of the territory can be alienated and pass into the hands of others than proprietors, and there are now, hundreds, if not thousands of acres of land in the District, which could be bought for a price almost nominal, yet find no purchaser, because such proprietors as are able to buy, already hold in severalty more land than they have any occasion for. There would, consequently, be no purchasers. If provision were made that others might become purchasers, it would initiate a vital change in the policy of the State, and lead to a gradual, but certain alienation of a consid-

erable portion of the lands of the tribe, whose owners would, probably, in that event, be thrown upon the public for support.

The organization of the District has unquestionably been advantageous to the tribe, in preparing them gradually for the change which must eventually come, in their political relations, when they shall be endowed with the rights of citizenship, with the duties, responsibilities, and obligations it imposes. It took away one ground of complaint, by enabling them, substantially, to manage their own affairs. In the same way it encourages their self-respect and adds to their feeling of individual responsibility. Their town meetings are, to them, what such meetings are to our country towns—schools which bring into exercise talents that otherwise might have lain dormant, and aid in better preparing them for other responsible duties. It is said that at some of the town meetings, the discussions are very animated, and are marked by considerable ability. At the public hearing given by the Commissioner at this place, the debates on the subjects introduced were as well conducted as similar debates are in any of our towns, and some of the speakers acquitted themselves very creditably. One of them, in particular, evinced much native humor and a fertility and aptness of illustration rarely equalled, indicating natural talents, that, with the advantages of an education, would have qualified him to shine in any station of life.

The expenditures of the District are, for the support of the poor, of the schools, and the highways, the pay of public officers, the treasurer's salary, and contingent expenses. These amounted, for the year ending September 30, 1859, to $2,398.02, but, in this amount is included between $700 and $800 for making new county roads through the District, the most of which expense was refunded by the State. The number of paupers in the District, dependent for their entire support, is seven, of whom three are State paupers, for whose support the District received in 1859 $189.85. The annual payments by the State, for the support of State paupers, for the last eleven years, have been as follows:—

1849,	$389 75	1856,	$212 00
1850,	299 45	1857,	117 00
1851,	247 69	1858,	147 18
1852,	436 62	1859,	189 85
1853,	426 52		
1854,	392 00		
1855,	273 84		$3,131 90

The average amount for the eleven years has been $284.72. For the six years preceding 1849, the average payment by the State for the same purpose was $359.24, while, for the six years last past the average has been only $187.97, or but a trifle more than one-half the average of the former period. The annual expense of the paupers of the District including payments for those who receive assistance as well as those requiring entire support, is about $400 per annum.

For the support of the schools of the District, formerly, $100 a year was appropriated from the school fund and $60 a year additional was received, as the interest of $1,000, which was set apart as the District's portion of the surplus revenue, making, in all, $160 a year. But, in 1856, the legislature added $165 a year to the amount, on condition that the District should appropriate $75, and thus make the whole up to $400 a year. This has been done by the District, so that the average annual length of the two schools is about eight months. A marked improvement has resulted from this increased appropriation, in the character of the schools and in the interest manifested in their success; an interest which, if properly sustained, promises most beneficial results in the future. The people are now anxious for increased advantages of this kind, and instructed the undersigned Commissioner, through their committee, to ask, on their behalf, an additional appropriation from the school fund of seventy-five dollars a year, on the condition that they will add twenty-five dollars a year, and thus make up the full sum applicable to the support of their schools, to five hundred dollars a year. This would give them about ten months schooling; and when it is considered that a great portion of the children are obliged to leave the schools as soon as they get to an age which makes their services valuable, in obtaining the means of support for themselves and the families

to which they belong, it seems very desirable, that, during the short period of their school life, they should have the opportunity of attending school as large a portion of the time, as is consistent with a sound and healthy physical development. The schools are now in good condition, compared with what they were formerly, and the average attendance is about 80 per cent. of the whole number of scholars, which, considering the tender age of many of them, and the great distance that a portion of them have to travel, to reach the school, may be considered very good. The school in the North District, the past year, (1859,) was kept by Miss Ann Fallon, who appears every way competent to the situation, and manifests a laudable interest in the improvement of those under her charge. The visit of your Commissioner to the school was quite satisfactory to him. He did not have the opportunity of visiting the school in the South District, which was taught during the last summer by Miss Nellie C. Davis, but he had a satisfactory report of its condition. The state of advancement of the pupils in these schools, will not, of course, bear comparison with the district schools in our towns. The time has not yet come for that, but, considering the former low state of education in the District, and the disadvantages under which they labor in the want of instruction at home and of association with educated people, with others incident to their peculiar condition, the progress is such as to give cause for hopeful anticipations for the future; and the Commissioner is decidedly of the opinion, that, if the additional amount asked for by the District can be appropriated from the school fund, without essential detriment to other public interests, on the conditions on which it is asked, it will be a good expenditure of the money.

For the support of public worship, no expenditure is required from the funds of the District, except for incidental and contingent expenses, the salary of the missionary laboring among them being paid from the income of the "Williams Fund" for the evangelization of the Indians, in charge of Harvard College. Formerly a minister was settled here, with whom, theologically, the inhabitants did not agree, and this led, gradually, to alienation of feeling, and personal bitterness between them. The consequence was an almost entire abandonment by the people, of attendance on his services, ending, finally, in a lawsuit,

which was settled by a compromise in 1849, and, since that time, they have enjoyed the privilege of selecting their own spiritual adviser and guide. The Rev. Daniel Hawley is now ministering among them, to apparent satisfaction. He has been with them for one year, and has been re-engaged for the present year.* He manifests a commendable interest in the spiritual and temporal welfare of his charge, but the habit of neglecting or omitting the attendance on religious services, which grew up during the difficulties with a former pastor, had become chronic, and it will probably take some time longer, yet, entirely to overcome it. Yet an increased interest is manifested in religious concerns, and a great improvement, in this respect, is conceded to have taken place within the last fifteen or twenty years, an improvement which may be continued and accelerated by the patient and faithful services of a self-sacrificing pastor. For such a one, this is a promising field of labor, a field where not the Sabbath alone may be profitably employed, but every day of the week, in advice, example, and encouragement, in secular as well as religious affairs. Ignorance, poverty, and want, are favorable neither to morality nor religion, and, with such a people as this, every improvement in their social condition, and every advance in knowledge, whether in literature, science, art, or domestic economy, prepares them for the more ready reception of the vital truths of religion, and qualifies them the better for the discharge of the duties devolving on them, as moral and accountable beings. Especially is the inculcation of industrious habits important, and he who will manage to interest them more in the pursuit of their avocations, who will teach them so to diversify their pursuits as to make them productive, and thus render them agreeable and attractive, will confer a favor on them, the extent and value of which can hardly be appreciated. There is nothing which strikes a stranger, visiting the District, with more force, than the want, among many of the people, of habits of patient, persevering, well-directed industry, and he who should effect a change in this respect, would be a public benefactor.

It should have been stated that the family of the missionary occupy the parsonage belonging to the District, connected with which, is about three acres of pretty good land under cultiva-

* 1859. He continued with them through the year 1860.

tion. The meeting-house of the District is a neat building, sufficiently capacious for the accommodation of the people, and, by the bounty of the State was put in good repair in 1855. It is beautifully situated in a fine grove, where the land slopes gently to the south and west, on one of the most prominent elevations in the District, commanding a good view of the adjacent country. The secluded situation, at some distance from any human dwelling, with no external sound but the rustling of the foliage in the breeze, the choral song of the feathered songsters, and, perhaps the distant roar of the ocean, is well calculated to inspire a religious and devotional feeling.*

The resources of the District from which to meet their expenditures, are, $325 from school fund and surplus revenue, toward the support of the schools; interest on the fund created by the sale of the wood on the parsonage lot, so called, which now amounts to about $120; fisheries, about $200, and rent of meadows, about $100. Aside from some other trifling occasional receipts, this is all the regular income that can be relied on, and whatever this falls short of meeting the expenditures, has to be taken from the principal of the fund. The amount of the expenditures for the year ending the 30th of September last, has already been stated at $2,898.02, including the amount paid for new roads. After deducting the amount received for school money, and $715, received of the State, on account of the new roads, the whole revenue of the District was insufficient by the sum of $677.04 to meet the expenditure, and that amount had to be taken from the principal of the fund and diminished it to that extent. At this rate, in less than four years more, the fund will be exhausted. When that is gone, there was formerly a prospect that its place might be supplied, to a considerable extent, at least, from the wood growing upon the common lands. There was a good growth again coming on, upon the parsonage lot, besides what stood upon the other common lands, but the great fires of the last season have nearly destroyed it all.

* Since this was written, during the year 1860, the Sabbath School Library of the District has been largely increased by donations from the Baptist friends of this people, in Boston, through the influence of a Boston lady who visited them, and interested herself in their Sabbath schools.

The tabular list, herewith presented (see Appendix, A) gives, in addition to the quantity of land held by the respective proprietors in severalty, a valuation thereof, with the improvements, and a valuation, also, of such personal property as is held by them, respectively, beyond what is exempted by law from attachment. This valuation was very carefully made, and, it is believed, presents a fair estimate of the value of property held by individuals in the District, to which, if the public property be added, will present the following aggregate of the value of all the property of the District:—

Value of 10,171 acres of land held in severalty, with the improvements thereon,	$67,055 00
Value of personal property	8,598 00
" of 2,300½ acres held in common,	9,202 00
" " 450 " " " (parsonage)	2,250 00
" " 250 " " " (cedar swamp)	1,000 00
" " 150 " salt and fresh meadows,	2,250 00
	$85,355 00

Public property, $14,702; private property, $70,653.

This valuation would have been considered a low one, two or three years since, before the devastating fires had swept over the District; but it is higher than the property would probably sell for, now, if put into the market.* This value, then, must be considered prospective rather than actual, to be enhanced as the wood again grows up. The amount of land held in severalty, gives an average of nearly one hundred and ten acres to each of the ninety-three families of the District, which, to those residing in sections of the State, where the soil is fertile, and valuable for cultivation, would seem to place them in very comfortable circumstances. But it must be remembered that most of this land is of no value, except for the wood it produces; that the wood is of very slow growth, and that nearly all of it has just been burnt off, so that a long time must elapse before it

* By this, is meant, if put into the market, with competition open to everybody. If put up at auction with the existing restriction, that none but proprietors of the District could be purchasers, much of this land would hardly bring enough to pay the auctioneer's fee.

will again yield any income. A better estimate of their condition may be made, by considering that the whole value of the real estate held by individuals in the District, averages only the nominal sum of seven hundred and seventy dollars to a family, including buildings and all improvements. and that a considerable portion, even, of this amount, is in land that will yield no income whatever, for nearly, or quite twenty years. But, the real poverty of the people is more strikingly evinced, by the fact, that the whole personal property of the District, saving such necessary articles as the law exempts from attachment, throughout the State, averages only about forty dollars to each family. In this almost entire absence of material prosperity, we cannot reasonably look for much social advancement. And, it is an undoubted fact, that there has been very little improvement, either socially or morally, in the District, within the last ten years. In the northern part, there has been some progress in these respects, while the central and southern portions have remained nearly or quite stationary, except in one or two instances.

The stock kept in the District, the value of which is included in the estimate of the value of the personal property, consists of eight horses, twenty-four oxen, twenty cows, thirty-four young cattle, fifty-five swine, and six sheep, being an increase, in the last eleven years, of two-horned cattle and twelve swine, and a diminution of eight horses, and thirteen sheep. The diminution of the horses has probably been in consequence of the destruction of their wood, being no longer required to carry it to market.

The amount paid from the State treasury for the last eleven years for the support of paupers, has already been stated. As the District supports its own paupers, and, as this money was paid for the support of State paupers, who happened to be residing there, it is not properly chargeable to the District. The amount drawn from the school fund, for the use of schools in the District, has also been stated. The payments by the State for other purposes in the District, during the same time, are as follows:—

1852, for parsonage house,	$600 00
1855, for repair of meeting-house,	500 00
1856, further sum for the same,	360 00
1855–6, for repairing school-houses,	525 00
1859, for new roads and bridge,	715 00
	$2,690 00

One of the county commissioners for the county of Barnstable has called the attention of the Commissioner to the subject of the expenditures of the county, incurred for the making of roads in Marshpee, and for the expenses of criminals belonging to that District.* The copious extract from his letter, contained in the annexed note, fully explains the ground of complaint,

* A letter from Edward W. Ewer, Esq., the county commissioner referred to, says: "Since I saw you I have been constantly engaged, so that I present you with general, only, rather than specific results in our accounts with the District of Marshpee. First, the road commencing near Solomon Attaquin's and running past the school-house in the North District, and which is purely local in its advantages, cost the county (land damages and fencing) $274.2. Second, the road passing near the meeting-house and extending to Waquoit Mills is of more general utility, and cost the county for construction $610. There was no land damage or fence to pay for on this road. Total for roads during the last year, exclusive of commissioners' bills, sheriffs' services, clerk's fees, advertising, &c., $884.28, which the State has been petitioned to refund to the county.

"The expenses at the jail for board of prisoners during the year 1857 were $1,002, of which $32 was for natives and residents of Marshpee, and about as much more on account of prisoners, whose crimes, but for their contact with this, unfortunately, weaker race, had never been committed. In 1858 the whole expense at the jail at Barnstable was $1,226, of which $93.06 was for Marshpeeans, with the same allowance as above to Marshpee, as the procuring cause. Thus, about 8 per cent. of the cost of boarding prisoners at bar is directly referable, and twice that number indirectly, to our contiguity to the District. This does not look so large as it would when we consider that, probably, about the same proportion of our criminal costs, so far as they are paid by the county, of the expense of constructing and maintaining county buildings &c., is chargeable to the same source, and this, too, when the State has assumed the guardianship and support of this race.

"We have a jail in Provincetown for that and the adjoining town of Truro, the expense of which, I think, is less than for the District of Marshpee alone. We consider our case anomalous. We do not object to bearing our full proportion of public burdens. Do we not, in your opinion, have to bear more? We think we do."

ship, with its privileges and responsibilities, by the Indians themselves, as a right they are desirous of possessing, would justify the extending of it to them. And it is satisfactory to know, that the Indians take a correct view of the matter. At the public hearing, given at Marshpee, the question was brought up for consideration. One of the first speakers, a foreigner,* who married a woman of the tribe, and who has resided but a short time in the District, near the border, among the better conditioned and more intelligent portion of the inhabitants, advocated the application to the legislature for the extension of the right to them, but after a full and free discussion, the vote was unanimous in favor of remaining as they are, the individual who had spoken on the other side voting with the rest.

A committee was appointed at the public hearing, to consider the wants of the District, and to report thereon to me. In their report, they request me to ask three things of the legislature, on their behalf,† viz.:

1. That authority be given, by law, to the District to nominate their own treasurer, subject, of course, to the confirmation of the governor and council.

2. That an addition of seventy-five dollars be made to the annual appropriation from the school fund, for the benefit of their schools, on condition that they add twenty-five dollars additional to it, so as to raise the amount annually expended for their schools from four hundred to five hundred dollars.

3. That they be empowered to elect a delegate to represent them in the legislature.

Superficially examined, there is much plausibility in the first of these requests. The youth of fourteen, who is left without a parent, is permitted to choose his own guardian, subject to the approval of the judge of probate; and why should not this community be allowed the same privilege, in relation to their treasurer, who, so far as the keeping of their funds is concerned, it is held, is a *quasi* guardian, under another name. If the same principles were involved in both cases, there would seem to be no good reason why the tribe should not have the privilege they ask. But they are not. In the case of the ward, who chooses his own guardian, the State has no interest other than that it has in the welfare of every other citizen of the State. The only duty that the guardian, as such, owes to the State is to protect the rights and guard the interests of his ward. But, in this case, the Marshpee District has not the means of providing, to the full extent, for its public charges, such as maintaining its poor, building and repairing its highways, supporting its schools, &c., and whatever deficiency there may be, in meeting these exigencies, the State provides for. It has, therefore, a direct interest in the safety of the funds of the District, and has virtually taken them into its own keeping, and thus become responsible for them. While, in a spirit of just liberality, it has relieved the District of the restraints formerly imposed on it, and conceded to it the right to elect its own officers, to manage its own public affairs, and to have control of all expenditures of money for such purposes, it has interposed its own authority only for the security of their funds from the danger of loss, to which all public moneys are so peculiarly exposed, and to which, from the circumstances of the case, those of the District would be more liable than most others. Having assumed this responsibility for the safe keeping of the funds, it is most obviously proper, that it should be unrestrained in the selection of the treasurer by whom that duty is to be performed. He is the officer of the State, and not of the tribe, and, if the view here taken is correct, it is the State and not the tribe that is to be affected, favorably or unfavorably, as this officer shall perform his duties with fidelity or otherwise. This being so, the appointment should obviously proceed from the party whose interest he represents. He should feel that he is the officer of the State, and not dependent on the proprietors of the District for the place he holds.

With this view of the question, I cannot recommend the change that is asked for. In the exercise of the duty which devolves on the governor, in making the appointment, there is no reason to fear that he will ever needlessly wound the sensibilities of the proprietors, or that he will not lend a patient ear to any representations they may make on the subject, and give them a candid consideration.

* This word is used in the Indian sense, to imply any one not a native of the plantation, or of one of the kindred tribes.

† See Appendix, B.

The request for an addition to the school money of the District has already been favorably noticed, but I cannot let the opportunity pass, without again urging its favorable consideration on the legislature. The establishment of permanent schools in both sections of the District, with only the necessary vacations, usual in such schools, under the charge of suitable teachers, would be a great blessing to the tribe; and I look upon it as one of the most effective agencies at our command, for its regeneration.*

The third request involves considerations less vital than the second, and it is, therefore, much less important how it may be determined. Some advantages would undoubtedly be secured by granting it. It would give to the members of the tribe a more general interest in the affairs of the State, and conduce to their political education, preparatory to the time when they may be required to assume the duties of citizenship. It would afford a healthy stimulus to the people, to qualify themselves, by intelligence and moral worth, for the office of delegate. The delegate would carry back from the legislature an amount of information and a general influence, that would not fail of being useful to the tribe, and the legislature itself would secure a source of information on matters pertaining to the Indians, in such a delegate, not readily accessible in any other mode. I would therefore commend the request to the candid consideration and sound judgment of the legislature. It is understood that the applicants would be satisfied with a biennial or even a triennial representation, and it will be understood of course, that, if allowed a delegate, he could have no right to vote.

I would here acknowledge the obligations I am under to Hon. Charles Marston, Treasurer of Marshpee, for the patience with which he has submitted to the protracted interrogating, to which I have had occasion to subject him, relative to the inhabitants and affairs of the District, and for the promptness and uniform courtesy with which he has responded to my inquiries, and which have marked his whole intercourse with me, the more

* It may not be inappropriate to say that my views, as here expressed, in favor of the proposed appropriation, and in relation to the importance of increased facilities for the education of the children of the tribe, have received the full concurrence of the treasurer of the District, to whom they have been submitted.

grateful, because it contrasts favorably with my experience in some other quarters. To Solomon Attaquin, one of the selectmen of Marshpee, for 1859, I am also under particular obligations, for the cheerful and ready aid he has afforded, and for the large amount of desirable information he has communicated. If the District had a few more men, combining in each, his intelligence, probity, and general character, we might look hopefully for its future progress in the right direction.

HERRING POND INDIANS.

This tribe is located on the east side of Herring Pond, on a neck of land lying between that pond and Cape Cod Bay, the territory being chiefly in the south-easterly part of Plymouth, but a small portion of it is in the northerly part of Sandwich; the nearest convenient point of access to it being from the railroad station at North Sandwich. The whole number of the tribe, excluding women who have married and live with their husbands in other tribes, is sixty-seven.*

Number of families,		19
Males,	31	
Females,	36	
	—	67
Natives, including those who were born in other tribes but married and live on the plantation,		62
Foreigners,		5
Under 5 years of age,	9	
From 5 to 10 years of age,	5	
10 to 21 years of age,	12	
21 to 50 years of age,	33	
50 to 70 years of age,	8	
Of 70 and over,	1	
	—	67

The mortality in this tribe, within a few years past, has been remarkably great, exceeding, even that at Christiantown and Chappequiddick, already referred to. Of fifty-five persons returned by the commissioners as belonging to the tribe in

* Having homes on the plantation, forty-five, residents elsewhere, twenty-two.

MARSHPEE TRIBE.

NAME.	Age.	Sex or Condition.	Tribe or Town.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
Solomon Attaquin,	49	Married,	Marshpee,	Farmer,	Marshpee,	$488	86	$1,468	$2,618
Cynthia Attaquin,	43	"	Herring Pond,	–	"	–	61*	530	–
Nancy Estella Attaquin,	3	Girl,	Marshpee,	–	"	–	–	–	–
Lewis Ellis Attaquin,	15	Boy,	"	–	"	20	118½	592	–
Sarah Attaquin,	70	Widow,	"	–	"	–	135	775	1,075
Benjamin J. Attaquin,	46	Widower,	"	Mariner,	"	–	135	900	1,845
Pamela Attaquin,	11	Girl,	"	–	"	–	–	–	–
Persis A. Attaquin,	8	"	"	–	"	–	–	–	–
Matthias Amos,	43	Married,	"	Mariner,	"	265	130	1,300	2,350
Clarissa Amos,	41	"	"	–	"	–	–	–	–
Clarinda C. Amos,†	15	Single,	"	–	"	–	–	–	–
Aurelius E. Amos,	8	Boy,	"	–	"	–	–	–	–
Horatio M. Amos,	5	"	"	–	"	–	–	–	–
Celina H. Amos,	9 mos.	Girl,	"	–	"	–	–	–	–
Della Amos,	38	Widow,	"	–	"	–	60	300	–
Elizabeth Amos,	5	Girl,	"	–	"	–	–	–	–
Lucinda Amos,	3	"	"	–	"	–	–	–	–
James Amos,	51	Married,	"	Mariner,	"	55	175	1,400	2,325
Persis Amos,	42	"	"	–	"	–	–	–	–
Israel Amos,	70	"	"	Mariner,	"	–	120	1,200	1,320
Polly Amos,	67	"	"	–	"	–	–	–	–

David Robbins,‡	29	Single,	Marshpee,	Mariner,	Marshpee,	–	–	–	–
Naomi Amos,	63	Widow,	"	–	"	–	263	$1,575	$1,575
Betsy Smith,	93	"	"	–	"	–	–	–	–
Daniel Q. Amos,	22	Married,	"	Mariner,	"	–	61	366	–
Adriana F. Amos,	22	"	"	–	"	–	–	–	–
Franklin H. Amos,	9 mos.	Boy,	"	–	"	–	–	–	–
Joseph Amos,§	54	Married,	"	Blind, Preacher,	Nantucket,	–	150	900	1,200
Phebe R. Amos,	40	"	"	–	"	–	–	–	–
Rebecca C. Amos,‖	24	Single,	"	–	"	–	10	70	–
Sarah B. Amos,	16	"	"	–	"	–	10	70	–
Cordelia B. Amos,	14	"	"	–	"	–	10	70	–
Benjamin F. Amos,	11	Boy,	"	–	"	–	–	–	–
Sampson F. Alvis,	56	Married,	"	Farmer,	Marshpee,	–	120	720	920
Hannah G. Alvis,	57	"	"	–	"	–	–	–	–
Ezekiel Alvis,¶	25	Single,	"	Mariner,	"	–	–	–	–
Clarissa Alvis,	14	"	"	–	"	–	–	–	–
Charles F. Alvis,	31	Married,	"	Mariner,	"	–	–	–	–
Jemima Alvis,¶	25	"	"	–	"	–	–	–	–
Mary Ann Alvis,	7	Girl,	"	–	"	–	–	–	–
Bethiah Alvis,	5	"	"	–	"	–	–	–	–
Kilburn Alvis,†	3	Boy,	"	–	"	–	–	–	–
Ebenezer Alvis,	3 wks.	"	"	–	"	–	–	–	–

* Situated at Herring Pond. † Sheep deceased.

‡ Since returned to Marshpee with all his family. § Since married to Hannah Tobey, and has a son, born in November, 1860.

‖ Since married to Warren Hammond.

¶ Since married to Lucy Ann Cuzzens. ** Has separated from her husband, and since married to Joseph Quippish.

MARSHPEE TRIBE—*Continued.*

NAME.	Age.	Sex or Condition.	Tribe or Race.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
William H. Butler,	33	Married,	African, (for.)	Shoemaker,	Marshpee,	–	60	$300	–
Sarah H. Butler,	32	"	Marshpee,	–	"	–	–	–	–
Ida Butler,	9 mos.	Girl,	"	–	"	–	–	–	–
John D. Brown,	45	Married,	Colored, (for.)	Farmer,	"	$114	75	415	$700
Sarah Brown,	51	"	Marshpee,	–	"	–	–	–	–
Azariah G. Brown,	13	Boy,	"	–	"	–	–	–	–
Emeline F. Brown,	11	Girl,	"	–	"	–	–	–	–
Sarah A. Brown,	10	"	"	–	"	–	–	–	–
Julia Ann Brown,	18	Single,	(For.,) adopted,	–	"	–	–	–	–
William Brown,	28	Married,	African, (for.)	Mariner,	"	–	–	–	–
Mercy H. Brown,	23	"	Marshpee,	–	"	–	–	–	–
Mary E. Brown,	1½	–	"	–	"	–	30	300	–
Martha Keeter,	50	Widow,	"	–	"	–	–	–	–
Noah Keeter,	32	Single,	"	Laborer,	"	–	–	–	–
John Baker,	35	Married,	"	Mariner,	New Bedford,	–	80	240	–
Charlotte M. Baker,	35	"	Chappequiddick,	–	"	–	–	–	–
Nancy Brooks,*	48	Widow,	Marshpee,	–	Yarmouth,	–	75	300	–
Ophelia Cesar,	75	"	"	–	Marshpee,	–	–	–	–
Oakes A. Coombs,	51	Married,	"	Farmer,	"	–	210	1,700	1,900
Dinah B. Coombs,	36	"	"	–	"	–	–	–	–
George Russell Coombs,	15	Boy,	"	–	"	–	–	–	–

Marins Coombs,	13	Boy,	Marshpee,	–	Marshpee,	–	–	–	–
Daniel C. Coombs,	13	"	"	–	"	–	–	–	–
Oakes Coombs,	4	"	"	–	"	–	–	–	–
William Coturn,	26	Single,	"	Mariner,	"	–	140	$700	–
Sylvia Cuco,	70	Widow,	Middleborough,	State pauper,	"	–	–	–	–
Jeremiah Cowett,	58	Widower,	Marshpee,	Farmer,	"	–	120	480	$480
Louisa A. Cowett,	33	Single,	"	–	"	–	–	–	–
John H. Cowett,	29	"	"	Mariner,	"	–	–	–	–
Esther Cowett,	24	"	"	–	"	–	–	–	–
Sarah E. Cowett,	21	"	"	–	"	–	–	–	–
James F. Cowett,	18	"	"	Mariner,	"	–	–	–	–
Nancy E. Cowett,	16	"	"	–	"	–	–	–	–
Fontenella S. Cowett,	13	"	"	–	"	–	–	–	–
John Henry Cowett,	1	Boy,	"	–	"	–	–	–	–
Lois Pells,	98	Widow,	"	–	"	–	–	–	–
Lucy Ann Carver,†	29	"	"	–	"	–	75	450	–
Lucy Ann Carver,	11	Girl,	"	–	"	–	75	450	–
Aurelia Carver,	8	"	"	–	"	–	–	–	–
Samuel Cowett,	32	Married,	"	Laborer,	"	–	60	180	–
Esther Cowett,	39	"	"	–	"	–	–	–	–
Jacob Cowett,	13	Boy,	"	–	"	–	–	–	–
Charles DeGrasse,	54	Single,	"	Crippled,	"	–	100	300	350
Elias DeGrasse,	44	"	"	Mariner,	"	–	100	400	700
Simon Edwards,	50	"	"	"	"	–	60	300	–

* Belongs now to Yarmouth, and resides there.

† Since married to Reuben Alvis.

MARSHPEE TRIBE—*Continued.*

NAME.	Age.	Sex or Condition.	Tribe or Race.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
Mercy Edwards,	70	Widow,	Marshpee,	–	Sandwich,	–	90	$360	–
Spencer Edwards,	41	Married,	"	Mariner,	"	–	150	450	–
Ophelia Edwards,	15	"	"	–	"	–	–	–	–
Esther C. Edwards,	21	Single,	"	–	"	–	–	–	–
Mary A. Edwards,	19	"	"	–	"	–	–	–	–
Susan Bowyer,	19	"	"	–	"	–	–	–	–
Henry Bowyer,	16	Boy,	"	–	"	–	–	–	–
James Bowyer,	15	"	"	–	"	–	–	–	–
Marianne Edwards,	9	Girl,	"	–	"	–	–	–	–
Sarah A. Edwards,	8	"	"	–	"	–	–	–	–
Betsy E. Edwards,	3	"	"	–	"	–	–	–	–
William H. Edwards,	2	Boy,	"	–	"	–	–	–	–
Albert F. Edwards,	6 mos.	"	"	–	"	–	–	–	–
Peter S. Foller,*	51	Married,	"	Mariner,	Marshpee,	$00	140	1,120	$1,195
Dinah T. Foller,	50	"	"	–	"	–	–	–	–
William Freeman,	–	"	African, (for.)	–	New York,	–	180	1,260	–
Ruth Freeman,	52	"	Marshpee,	–	"	–	–	–	–
James Gardiner,	23	Single,	"	Laborer,	New Bedford,	–	80	400	–
Wm. H. Gardiner,*	about 35	Married,	Colored, (for.)	Mariner,	Providence, R. I.	–	–	–	–
Mary Gardiner,	35	"	Marshpee,	–	"	–	–	–	–
Samuel M. Godfrey,	41	"	Colored, (for.)	Mariner,	Marshpee,	–	25	375	650
Hannah Godfrey,	33	"	Marshpee,	–	"	–	–	–	–

Lysander D. Godfrey,	17	Boy,	Marshpee,	–	Marshpee,	–	–	–	–
Alonzo Godfrey,	15	"	"	–	"	–	–	–	–
Melissa E. Godfrey,	14	Girl,	"	–	"	–	–	–	–
James M. Godfrey,	12	Boy,	"	–	"	–	–	–	–
Susan B. Godfrey,	10	Girl,	"	–	"	–	–	–	–
Frances E. Godfrey,	7	"	"	–	"	–	–	–	–
Ann Godfrey,	6 mos.	"	"	–	"	–	–	–	–
Oliver Gardiner,†	23	Single,	"	Mariner,	"	–	30	$120	–
Leah Gardiner,	15	"	"	–	"	–	30	120	–
Roland Gardiner,	4 mos.	Boy,	"	–	"	–	–	–	–
Watson Hammond,‡	22	Single,	"	Mariner,	"	–	30	180	–
John Hendricks,	51	Married,	Colored, (for.)	"	"	–	–	–	–
Chloe Hendricks,	53	"	Marshpee,	–	"	–	90	360	$400
Isaac Hendricks,§	23	Single,	"	Mariner,	"	–	–	–	–
Hannah Hersh,	76	"	"	–	Hyannis,	–	–	–	–
Sally Hersh,	71	"	"	–	"	–	–	–	–
John Holmes,	28	Married,	"	Mariner,	St. Johns, N. B.	–	–	–	–
—— Holmes, (his wife,)		"	(foreigner,)	–	"	–	–	–	–
William W. Holland,	36	"	Colored, (for.)	Farmer,	Marshpee,	–	–	–	–
Sally Holland,	27	"	Marshpee,	–	"	–	80	400	575
Francis Hicks,	70	"	Colored (for.)	Farmer,	"	$250	–	–	–
Bathsheba Hicks,	65	"	Marshpee,	–	"	–	60	300	615

* Sheet deceased.

† Sheet married to Harriet Robbins.

‡ Sheet married to Isabella F. Whiting, but now a widower.

§ Sheet married to Rebecca T. Amos.

MARSHPEE TRIBE—*Continued.*

NAME.	Age.	Sex or Condition.	Tribe or Race.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
Abner Hicks,	73	Married,	Colored, (for.)	Farmer,	Marshpee,	$175	-	-	-
Sally Hicks,	73	"	Marshpee,	-	"	-	180	$1,080	$1,330
Eleanor B. Hicks,	34	Single,	"	-	"	-	-	-	-
Amanda M. Hicks,	12	Girl,	"	-	"	-	-	-	-
Frankie Hicks,	7	Boy,	"	-	"	-	-	-	-
Mercy A. Hicks,	4 mos.	Girl,	"	-	"	-	-	-	-
Horace A. Hicks,	15	Boy,	"	-	"	-	-	-	-
Andrew Hicks,	12	"	"	-	"	-	-	-	-
Mary T. P. Low,	19	Single,	"	-	"	-	30	90	-
Ariel F. Low,	17	Boy,	"	-	"	-	30	90	-
Susanna A. Low,	15	Girl,	"	-	"	-	20	80	-
Carmeta F. Low,	12	"	"	-	"	-	20	80	-
Cornelius K. Low,	6	Boy,	"	-	"	-	20	80	-
Hannah P. Low,	3	Girl,	"	-	"	-	20	80	-
							20	80	-
Hebron Hicks,	43	Married,	"	Miner,	California,	-	60	180	-
Mercy Hicks,	44	"	"	-	Marshpee,	-	60	180	-
Thomas L. Hicks,	16	Boy,	"	-	"	-	-	-	-
Meiora E. Hicks,	15	Girl,	"	-	"	-	-	-	-
Christopher Hinson,	77	Married,	"	Farmer,	"	-	50	220	260
Susanna Hinson,	77	"	-	-	"	-	-	-	-
Hezekiah Jackson,	32	"	Colored, (for.)	Laborer,	"	-	-	-	-
Jerusha Jackson,	22	"	Marshpee,	-	"	-	-	-	-
Lafayette Jackson,	3	Boy,	"	-	"	-	50	300	325
Fanny L. Jackson,	1	Girl,	"	-	"	-	-	-	-

Betsy James,	35	Widow,	Marshpee,	-	Marshpee,	-	53½	$214	-
John Thompson,	19	Boy,	"	-	"	-	-	-	-
Lydia Thompson,*	16	Single,	"	-	"	-	-	-	-
Hannah Thompson,	14	"	"	-	"	-	-	-	-
Lydia Jackson,	74	Widow,	"	-	"	-	-	-	-
Thomas Jonas,	49	Married,	Colored, (for.)	Jobber,	"	$40	50	180	$220
Rosanna Jonas,	42	"	Marshpee,	-	"	40	-	-	-
Frederick D. Jonas,	8	Boy,	"	-	"	-	50	500	535
Infant,†	-	Girl,	-	-	"	-	-	-	-
Lisbern Johnson,‡	67	Married,	Colored, (for.)	State pauper,	"	-	-	-	-
Nancy Johnson,	45	"	Marshpee,	-	"	50	161	1,044	1,494
William Jones,	50	"	"	Miner,	California,	-	120	360	-
Antoniette Jones,	"	"	Colored, (for.)	-	Portland, Me.	-	-	-	-
George H. Jones,	22	Single,	Marshpee,	-	" "	-	-	-	-
Wm. Alexander Jones,	20	"	"	-	" "	-	-	-	-
Sarah Louisa Jones,	18	"	"	-	" "	-	-	-	-
Azey Jones,	41	Widow,	"	-	Marshpee,	-	135	1,080	1,325
Mary S. Jones,	11	Girl,	"	-	"	-	-	-	-
Almira B. Jones,	9	"	"	-	"	-	-	-	-
Caroline F. Jones,	6	"	"	-	"	-	-	-	-
Samuel R. Jones,	5	Boy,	"	-	"	-	-	-	-
Abby F. Jones,	3	Girl,	"	-	"	-	-	-	-
Mary H. Jones,	35	Widow,	"	-	"	-	-	-	-
Oliver F. Jones,	10	Boy,	"	-	"	47	140	910	1,185
Ann M. Jones,	8	Girl,	"	-	"	-	-	-	-

* Sister committed to Bliss P. Poltz.

† Mother deceased.

‡ He has since committed, or to a public charge.

MARSHPEE TRIBE—*Continued.*

NAME.	Age.	Sex or Condition.	Tribe or State.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
Aaron Keeter,	54	Married,	Marshpee,	Laborer,	Marshpee,	–	–	–	–
Mary Keeter,	47	"	"	–	"	–	–	–	–
James J. Keeter,	21	Single,	"	Mariner,	"	$105	160	$480	$530
J. Sylvester Keeter,	15	Boy,	"	–	"	–	–	–	–
Edmund Keeter,	11	"	"	–	"	–	–	–	–
Lorenzo Keeter,	9	"	"	–	"	–	–	–	–
Simon W. Keeter,	42	Married,	"	Farmer,	"	75	210	1,050	1,250
Lydia Keeter,	40	"	"	–	"	–	–	–	–
Elizabeth Keeter,	9	Girl,	"	–	"	–	–	–	–
Benjamin Keeter,	4	Boy,	"	–	"	–	–	–	–
Lucy Keeter,	4	Girl,	"	–	"	–	–	–	–
Rachel A. Keeter,*	2	"	"	–	"	–	–	–	–
Abigail Keeter,	2 mos.	"	"	–	"	–	–	–	–
Nicholas P. Keeter,	32	Married,	"	–	"	–	–	–	–
Diana Keeter,	35	"	"	Jobber,	"	–	120	480	–
John Kennedy,	27	"	"	–	"	–	–	–	–
Hepzibah J. Kennedy,	28	"	"	Farmer and mariner,	"	–	60	240	315
Sarah Kennedy,	2 mos.	Girl,	"	–	"	–	–	–	–
James A. Lippett,	57	Married,	Colored, (for.)	Miner,	California,	–	–	–	–
Sarah Lippett,	51	"	Marshpee,	–	Marshpee,	–	60	180	220
Richard Layton,	50	Married,	Colored, (for.)	Barber,	Boston,	–	120	–	–
Lucy A. Layton,	39	"	Marshpee,	–	"	–	–	–	–

William Henry Layton,	21	Single,	Marshpee,	Barber,	Boston,	–	–	–	–
Theodore G. Layton,	15	Boy,	"	–	"	–	–	–	–
Ebenezer Low,	67	Married,	Colored, (for.)	Farmer,	Marshpee,	$165	120	$936	$1,261
Celia Low,	66	"	Marshpee,	–	"	–	–	–	–
Roxana Manning,	37	–	"	–	"	–	–	–	–
Marshall Manning,	13	Boy,	"	–	"	–	–	–	–
Charles Lee,	38	Married,	"	Mariner,	New York,	–	120	480	–
——— Lee, (his wife,)	–	"	Unknown,	–	"	–	–	–	–
William Lee,	34	"	Middleboro',	Mariner,	Absent in Califor.,	–	–	–	–
Emeline Lee,	38	"	Marshpee,	–	Marshpee,	–	–	–	–
Charlotte Lyons,	26	Widow,	Unknown,	–	New Bedford,	–	–	–	–
Harriet Frances Lyons,	10	Girl,	"	–	"	–	–	–	–
Jeanette F. Lyons,	7	"	"	–	"	–	–	–	–
John Mashow,†	54	Married,	Colored, (for.)	Shipwright,	Dartmouth,	–	60	480	–
Hope Mashow,	40	"	Marshpee,	–	"	–	–	–	–
Mary F. Mashow,	26	Single,	"	–	"	–	–	–	–
Isaac H. Mashow,	23	"	"	–	"	–	–	–	–
Emily O. Mashow,	18	"	"	–	"	–	–	–	–
John Albert Mashow,	16	Boy,	"	–	"	–	–	–	–
Maria A. Mashow,	14	Girl,	"	–	"	–	–	–	–
Charles W. Mashow,	12	Boy,	"	–	"	–	–	–	–
Ellen M. Mashow,	10	Girl,	"	–	"	–	–	–	–
George A. Mashow,	8	Boy,	"	–	"	–	–	–	–
Frank E. Mashow,	4	"	"	–	"	–	–	–	–
Eliza B. Mashow,	2	"	"	–	"	–	–	–	–

* Since deceased.

† One more child since born, viz: August, 1860, a girl.

MARSHPEE TRIBE—*Continued.*

NAME.	Age.	Sex or Condition.	Tribe or Race.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
Charles D. Mingo,	54	Married,	Colored, (for.)	State Pauper,	Marshpee.	–	–	–	–
Sarah Mingo,*	62	"	Marshpee,	–	"	–	–	–	–
Franklin Goodwin,	29	Single,	"	Steam-boat hand,	Holmes' Hole.	–	–	–	–
Walter Mingo,	21	Married,	"	Mariner,	"	–	140	$639	–
Frances Mingo,	26	"	"	–	"	–	–	–	–
George Henry Mingo,	2	Boy,	"	–	"	–	–	–	–
Dorcas Mills,	36	Widow,	"	–	Marshpee.	–	–	–	–
William J. Mills,	16	Boy,	"	–	"	–	–	–	–
James S. Mills,	15	"	"	–	"	–	–	–	–
Elizabeth S. Mills,	13	Girl,	"	–	"	–	–	–	–
Lewis Mills,	11	Boy,	"	–	"	–	–	–	–
Ophelia P. Mills,	7	Girl,	"	–	"	–	–	–	–
David Mye,	55	Married,	"	Mariner,	"	$15	120	600	$650
Margery Mye,	42	"	"	–	"	–	–	–	–
Adeline B. Gardner,	17	Single,	"	–	"	–	–	–	–
Ella Florence Gardner,	1	Girl,	"	–	"	–	–	–	–
James F. Mye,†	19	Single,	"	Mariner,	"	–	20	120	–
Thomas Mye,	31	"	"	"	"	–	20	120	–
William F. Mye,‡	29	"	"	"	"	–	20	120	–
Susan Mye,	42	"	"	–	Portland, Me.,	–	60	180	–
George T. Ockry,	41	Married,	"	Farmer,	Marshpee,	88	60	382	907
Betsy J. Ockry,	38	"	"	–	"	–	–	–	–

Euphrasia A. Ockry,	15	Single,	Marshpee,	–	Marshpee,	–	–	–	–
James A. Ockry,	11	Boy,	"	–	"	–	–	–	–
George L. Ockry,	7	"	"	–	"	–	–	–	–
Gertrude C. Ockry,	4	Girl,	"	–	"	–	–	–	–
Martha C. Ockry,	2	"	"	–	"	–	–	–	–
Addie B. Ockry,	1	"	"	–	"	–	–	–	–
James F. Pells,	19	Single,	"	Mariner,	"	–	–	–	–
Moses Pocknet,	60	Married,	"	Farmer,	"	$213	100	$640	$740
Mercy S. Pocknet,	50	"	"	–	"	–	–	–	–
Alexander D. Pocknet,	29	Single,	"	Mariner,	"	–	–	–	–
Grafton G. Pocknet,	23	"	"	"	"	–	–	–	–
Susan Pocknet,	20	"	"	–	"	–	–	–	–
Reliance Pocknet,§	17	"	"	–	"	–	–	–	–
Henrietta Pocknet,	15	"	"	–	"	–	–	–	–
Triphosa Pocknet,	13	"	"	–	"	–	–	–	–
Timothy Pocknet,	55	Married,	"	Mariner,	"	–	80	400	450
Mary Ann Pocknet,	47	"	"	–	"	–	120	540	615
Russell Brown,	16	Boy,	"	–	"	–	–	–	–
Nathan S. Pocknet,	50	Married,	"	Mariner,	"	–	150	900	1,100
Elizabeth Pocknet,	26	"	"	–	"	–	30	120	–
Zacchæus Pocknet,	7	Boy,	"	–	"	–	–	–	–
Benjamin F. Pocknet,	5	"	"	–	"	–	–	–	–
Angeline Pocknet,	4	Girl,	"	–	"	–	–	–	–
Teresa Pocknet,	2	"	"	–	"	–	–	–	–
Edward Pocknet,	Inf.	Boy,	"	–	"	–	–	–	–

* Died in 1860.

† Since married to Ellen Gardner of Herring Pond.

‡ Since married to Susan Manning, confirmed with of Alvan Manning, of Gay Head.

§ Since married to Jacob Pocknet.

MARSHPEE TRIBE—*Continued.*

NAME.	Age.	Sex or Condition.	Tribe or Race.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
Gideon N. Pocknet,	50	Married,	Marshpee,	Jobber,	Marshpee,	–	197	$985	$1,010
Mahala B. Pocknet,	37	"	"	–	"	–	–	–	–
Jacob Pocknet,*	21	Single,	"	Mariner,	"	–	–	–	–
Sarah Ann Pocknet,	18	"	"	–	"	–	–	–	–
Celia R. Pocknet,	17	"	"	–	"	–	–	–	–
Eusebia Pocknet,	15	"	"	–	"	–	–	–	–
Lucinda Pocknet,	11	Girl,	"	–	"	–	–	–	–
Edgar Pocknet,	8	Boy,	"	–	"	–	–	–	–
Emma Frances Pocknet,	7	Girl,	"	–	"	–	–	–	–
Henry C. Pocknet,	5	Boy,	"	–	"	–	–	–	–
Joshua Pocknet,	40	Married,	"	Mariner,	California,	–	140	840	870
Harriet Pocknet,	40	"	"	–	–	–	–	–	–
Elijah W. Pocknet,	30	Married,	"	Farmer,	Marshpee,	–	120	420	820
Phebe A. Pocknet,	30	"	"	–	"	–	–	–	–
Olivia T. Pocknet,	9	Girl,	"	–	"	–	–	–	–
Phebe F. Pocknet,	7	"	"	–	"	–	–	–	–
Elijah W. Pocknet, Jr.,	5	Boy,	"	–	"	–	–	–	–
Joshua A. Pocknet,	3	"	"	–	–	–	–	–	–
John Pompey,	40	Married,	"	Mariner,	Cotuit Port,	–	80	480	530
Elizabeth Pompey,	33	"	White, (for'gner)	–	"	–	–	–	–
Angelia F. Pompey,	9	Girl,	Marshpee,	–	"	–	–	–	–
Cynthia A. Pompey,	7	"	"	–	"	–	–	–	–
Caroline Pompey,	5	"	"	–	"	–	–	–	–
Edward Pompey,	1 mo.	Boy,	"	–	"	–	–	–	–

Dives Quippish,	70	Widower,	Marshpee,	Farmer,	Marshpee,	–	260	$1,300	$1,400
Daniel Quippish,	68	"	"	"	"	$25	63	378	503
Joseph Quippish,†	29	Single,	"	"	"	–	30	150	–
Harriet Rollins,‡	28	Widow,	"	–	"	–	134	670	–
Thomas G. Sewall,	40	Married,	Colored, (for.)	Farmer, formerly Barber,	"	150	–	–	–
Ann Sewall,	40	"	"	–	"	–	63	310	1,060
Matilda Simon,	66	Widow,	Marshpee,	–	"	–	14	84	–
Martha Ann Mye,	13	Girl,	"	–	"	–	20	60	–
Anna Maria Mye,	11	"	"	–	"	–	20	60	–
Mehitable S. Mye,	9	"	"	–	"	–	20	60	–
William Henry Simon,	37	Married,	"	Mariner,	"	140	192	1,344	1,344
Lucy M. Simon,	33	"	"	–	"	–	–	–	–
Daniel S. Simon,	11	Boy,	"	–	"	–	–	–	–
Melinda E. Simon,	9	Girl,	"	–	"	–	–	–	–
Mehitable P. Simon,	8	"	"	–	"	–	–	–	–
Wm. Henry Simon, Jr.,	7	Boy,	"	–	"	–	–	–	–
Lucy L. Simon,	4	Girl,	"	–	"	–	–	–	–
Azubah A. Simon,	2	"	"	–	"	–	–	–	–
Isaac Simon,	6 mos.	Boy,	"	–	"	–	–	–	–
William Simmons,	65	Married,	Colored, (for.)	Farmer,	"	–	–	–	–
Patience Simmons,	40	"	Marshpee,	–	"	–	60	240	–
Sarah R. Simpson,§	–	"	"	–	"	–	60	180	–

* Have married to Bethiah Pocknet.

† Have married to Jemima Alvis, undivorced wife of Charles F. Alvis.

‡ Have married to Oliver Gardner.

§ Belongs by marriage and residence to Chappaquiddick.

MARSHPEE TRIBE—*Continued.*

NAME.	Age.	Sex or Condition.	Tribe or Race.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
Susan Stanley,	33	Widow,	Marshpee,	—	Marshpee.	—	—	—	—
Kate Stanley,	12	Girl,	"	—	"	—	—	—	—
Ann Stanley,	10	"	"	—	"	—	—	—	—
Frank Stanley,	8	Boy,	"	—	"	—	—	—	—
John Thompson,	28	Married,	Gay Head,	Mariner,	"	—	—	—	—
Hannah P. Thompson,	23	"	Marshpee,	—	"	—	—	—	—
Joseph Tobey,	62	Married,	"	Farmer,	"	$65	120	$720	$870
Jedida Tobey,	60	"	"	—	"	—	—	—	—
Oaker A. Tobey,	28	Single,	"	Mariner,	"	—	—	—	—
Sylvania Tobey,	26	"	"	"	"	—	—	—	—
Margaret Tobey,	22	"	"	—	"	—	—	—	—
Joseph Tobey, Jr.,	42	Married,	"	Farmer,	"	75	150	750	800
Leah Tobey,	38	"	"	—	"	—	—	—	—
Henrietta Tobey,*	21	Single,	"	—	"	—	—	—	—
Sarah Tobey,	19	"	"	—	"	—	—	—	—
John Tobey,	16	"	"	—	"	—	—	—	—
Jedida Tobey,	14	"	"	—	"	—	—	—	—
Ephraim Tobey,	37	Married,	"	Mariner,	"	—	60	300	400
Philena Tobey,	24	"	"	—	"	—	—	—	—
Sidney Tobey,	5	Boy,	"	—	"	—	—	—	—
Corinne Tobey,	4	Girl,	"	—	"	—	—	—	—
Margaret Tobey,	2	"	"	—	"	—	—	—	—
Alphonso Tobey,	4 mos.	Boy,	"	—	"	—	—	—	—

Stephen Van Rensellaer,	28	Married,	Colored, (for.)	Mariner,	Marshpee.	—	—	—	—
Lucien G. Van Rensellaer,	33	"	Marshpee,	—	"	—	30	$120	—
Josephine Williams,	12	Girl,	"	—	"	—	—	—	—
John Vallon,	26	Married,	Colored, (for.)	Mariner,	Holmes' Hole.	—	—	—	—
Sarah Vallon,	23	"	Marshpee,	—	"	—	—	—	—
Bradford Vallon,	9	Boy,	"	—	"	—	—	—	—
Clarissa Mingo,	20	Single,	"	—	"	—	—	—	—
Sarah F. Mingo,	1½	Girl,	"	—	"	—	—	—	—
Jesse Webquish,	76	Married,	"	Farmer,	Marshpee.	—	150	900	$1,050
Prudence P. Webquish,	57	"	"	—	"	—	—	—	—
Jesse Webquish, Jr.,†	33	Married,	"	Mariner,	New Bedford.	—	—	—	—
Rebecca J. Webquish,	27	"	"	—	Marshpee.	—	—	—	—
Estella B. Webquish,	4	Girl,	"	—	"	—	—	—	—
Levi S. Webquish,	29	Married,	"	Mariner,	"	—	—	—	—
Anna F. Webquish,	25	"	"	—	"	—	—	—	—
Levi Webquish,	8	Boy,	"	—	"	—	10	70	—
Thaddeus Wickham,	10	"	"	—	"	—	—	—	—
William Webquish,	28	Married,	"	Mariner,	"	—	25	75	—
Minerva Webquish,	31	"	"	—	"	—	30	120	—
Ferdinand Webquish,	3	Boy,	"	—	"	—	—	—	—
Nancy Williams,	66	Widow,	"	—	"	—	—	—	—
John H. Webster,	—	Married,	Colored, (for.)	Mariner,	Plymouth.	—	60	240	465
Ruth R. Webster,	27	"	Marshpee,	—	"	—	—	—	—
Infant,	—	—	"	—	"	—	—	—	—

* Have married to David Robbins.

† Jesse Webquish, Jr., and his wife have separated, and he has since married another woman in New Bedford, who calls her name Emeline Webquish, by whom he has a daughter, two years old, named Louisa M.; but, as he has never been divorced, the latter marriage is, of course, void, and the issue thereof, consequently illegitimate.

MARSHPEE TRIBE—*Continued.*

NAME.	Age.	Sex or Condition.	Tribe or Race.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
Jane A. Whiting,	50	Widow,	Marshpee,	–	Marshpee,	–	53	$159	$234
Isabella F. Whiting,*	21	Single,	"	–	"	–	–	–	–
Lauretta L. Whiting,	17	"	"	–	"	–	–	–	–
Iantha Whiting,	2	Girl,	"	–	"	–	–	–	–
Gilbert Whiting, infant,		Boy,	"	–	"	–	–	–	–
David Wilbur,	76	Widower,	"	Farmer,	"	$80	102	408	458
Joseph Wilbur,	36	Single,	"	Mariner,	"	–	–	–	–
James Wilbur,	29	"	"	"	"	–	–	–	–
John Young,	50	Married,	Colored, (for.)	Farmer,	"	30	220	880	1,080
Mary R. Young,	43	"	Marshpee,	–	"	–	–	–	–
Austin Young,†	18	Single,	"	–	"	–	–	–	–
Fanny R. Young,†	13	"	"	–	"	–	–	–	–
Maria Antonietta Young,†	7	Girl,	"	–	"	–	–	–	–
John Young, Jr.,†	5	Boy,	"	–	"	–	–	–	–
Lydia Ann Young,	3 mos.	Girl,	"	–	"	–	–	–	–
James Henry Pells,	21	Single,	"	Mariner,	"	–	–	–	–
Silas Parker Pells,‡	21	"	"	"	"	–	–	–	–
Foster L. Pells,	19	"	"	"	"	–	–	–	–
Olive G. Pells,	15	"	"	–	"	–	–	–	–
Mary F. Pells,	13	"	"	–	"	–	–	–	–
Gustavus D. Pells,	11	Boy,	"	–	"	–	–	–	–
Leah Quippish,	4[illegible]	Widow,	"	–	"	–	20¼	1,423	1,453
James A. Lewis,	[illegible]	Boy,	"	–	"	–	–	–	–

* Since married to Isaac Hendricks but subsequently deceased.

† Those with this mark are children of John Young, by a former wife. Those which follow are children of Mary R. Young; three named Pells, by Jacob Pells, her first husband.

‡ Since married to Lydia Thompson.

SUPPLEMENTARY LIST.

In addition to the foregoing, are several persons, who either left Marshpee previous to the division of the land, or are descendants of such, but who are not recognized as having rights in Marshpee, among whom are the following:—

NAME.	Age.	Sex or Condition.	Tribe or Race.	Occupation.	Residence.	Personal Property.	Acres of Land in severalty.	Value of Land.	Value of Land and Buildings.
Sarah Brown,	73	Widow,	Marshpee,	–	Wareham,	–	–	–	–
John Jones,	55	Married,	(Foreigner,)	–	"	–	–	–	–
Lucy Jones,	53	"	Marshpee,	–	"	–	–	–	–
James Jones,	19	Single,	"	–	"	–	–	–	–
James Brown,	51	"	"	–	"	–	–	–	–
William Brown,	44	"	"	–	"	–	–	–	–
Maria Smith,	40	Widow,	"	–	"	–	–	–	–
Mary Smith,	20	Single,	"	–	"	–	–	–	–
Andrew Smith,	16	Boy,	"	–	"	–	–	–	–
Isaac Smith,	13	"	"	–	"	–	–	–	–
Fanny Smith,	13	Girl,	"	–	"	–	–	–	–
Oliver Smith,	10	Boy,	"	–	"	–	–	–	–
Emeline Rollins,	25	Widow,	"	–	"	–	–	–	–
Henry Rollins,	13	Boy,	"	–	"	–	–	–	–

Office-Supreme Court, U.S.
FILED
NOV 18 1983
ALEXANDER L. STEVAS
CLERK

NO. 83-624

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

MASHPEE TRIBE, ET AL.,
Petitioners,

v.

JAMES G. WATT, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether both the trial and appellate courts properly concluded that a puntative indian "tribe" and its individual members could not maintain an action seeking to recover their "ancestral" land, where a jury has previously determined that they do not constitute a "tribe" and where they seek not only to relitigate their status but also to raise claims and theories not raised in the prior action.

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STATEMENT OF THE CASE

This is the third time within three years this Court will have the opportunity to consider a writ of certiorari regarding claims relating to individuals calling themselves the "Mashpee Tribe". The Court has previously denied to issue a writ in Mashpee Tribe v. Town of Mashpee, 447 F.Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), cert. denied, 444 U.S. 866 (1979), and Mashpee Tribe v. New Seabury Corp., cert. denied, ___U.S. ____, 52 U.S.L.W. 3249 (October 1, 1983).

Additionally, the "Mashpee Tribe" filed a Motion for Leave to file an original jurisdiction complaint with this Court captioned Wampanoag Indian Nation, et al. v. Commonwealth of Massachusetts, but later withdrew the motion.

This particular case started on December 18, 1981, when three hundred and thirty-four (334) individuals claiming to be members-descendents of the alleged Mashpee Tribe commenced an action in the United States District Court for the District of Massachusetts, on their own behalf and on behalf of the Mashpee Tribe. By this action the Plaintiffs sought to recover what they consider to be tribal lands allegedly conveyed by their ancestors in violation

of the Constitution and federal statutes.[1] The Plaintiffs' primary assertion is that the Commonwealth of Massachusetts and the Town of Mashpee, by authorizing and validating the conveyances of certain lands in question,[2] violated their rights under the Constitution, the Indian Nonintercourse Act, 25 U.S.C. § 177, (the Nonintercourse Act) and numerous

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1/ A comprehensive treatment of these transactions can be found in the prior case filed dealing with the instant issues. See Mashpee Tribe v. Town of Mashpee, 447 F.Supp. 940, 943-947 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp. 592 F.2d 575 (1st Cir.) cert denied, 444 U.S. 886 (1979)

2/ The Plaintiffs allege that the Commonwealth of Massachusetts violated the Nonintercourse Act when the Massachusetts General Court enacted 1869 Mass. Acts 463 and 1870 Mass. Acts 293 regarding the conveyance and transfer of certain land in the Town of Mashpee.

other federal and state statutes. The Plaintiffs sought declaratory and injunctive relief as well as damages.

This, however, was not the first time that a group of individuals calling themselves the "Mashpee Tribe" filed a Nonintercourse Act claim seeking recovery of the land claimed in the instant case. On August 26, 1976, a complaint was filed by the alleged Mashpee Tribe against virtually the same defendants seeking recovery of the same land claimed in the case at bar. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.) cert. denied, 444 U.S. 866 (1979) (Mashpee I). Just as in the instant action, their claim was based on the assertion

that their rights under the Nonintercourse Act had been violated by the actions of Massachusetts General Court by its enacting 1869 Mass. Acts 463 and 1870 Mass. Acts 293. It did not advance all of the causes of action the Plaintiffs now seek to raise nor did Plaintiffs' counsel make the Nonintercourse Act argument current counsel seeks to advance. Still, the basic cause of action and the parties were identical to those in the claim which spawns this, their third petition for certiorari.

In Mashpee I the threshold issue of tribal existence for purposes of the Nonintercourse Act was tried for forty (40) days. The jury found that the Plaintiffs were unable to prove that they were indeed an indian tribe at certain critical dates, including the

date on which the case was initiated, in order to invoke the application of the Act. Therefore, the Mashpee I case was dismissed on the merits. The Court of Appeals affirmed that decision, Mashpee Tribe, 592 F.2d 575 (1st Cir. 1979), and this Court thereafter refused to accept certiorari, 444 U.S. 866 (1979).[3/]

On June 30, 1982 the District Court dismissed the instant action. Mashpee Tribe, et al. v. James G. Watt, et al., 542 F.Supp. 797 (D. Mass. 1982) (Mashpee II). In dismissing the Plaintiffs' case, the District Court held inter alia, that the tribal claims were barred by the

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3/ Four years after final judgment on Mashpee I the Plaintiffs unsuccessfully attempted to reopen the case at the appellate level of the federal courts. See Mashpee Tribe, cert. denied, ___ U.S.___, 52 U.S.L.W. 3249 (October 4, 1983)

doctrines of res judicata and collateral estoppel as a result of the decision in Mashpee I. The Court also held that the Nonintercourse Act does not provide for individual claims for relief, and that the plaintiffs myriad other causes failed to support a claim. The decision was affirmed by the Court of Appeals for the First Circuit in a two page per curiam opinion, Mashpee II, 707 F.2d at 25 (1st. Cir. 1982). The Plaintiffs have now filed this petition for writ of certiorari.

ARGUMENT

THIS, THE PETITIONERS' THIRD WRIT, SHOULD BE DENIED, BECAUSE THE LOWER COURTS CORRECTLY DISMISSED THE ACTION USING WELL ESTABLISHED PRINCIPLES OF FINALITY OF JUDGMENTS.

An examination of the decisions below in both the instant case and Mashpee I clearly demonstrates that

there is no reason to grant the requested Writ of Certiorari. This case does not present important indian law issues which have divided the lower federal courts. Instead, it provides a straight-forward application of the fundamental rule of judicial repose embodied in the twin doctrines of res judicata and collateral estoppel. In short, there is no important question of federal law presented which should be settled by this Court which has not already been settled. The Lower Courts have not departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Rather the decisions below are well reasoned

and based on axiomatic legal principles.

Clearly, the Court of Appeals acted properly in dismissing this case on the basis of res judicata. In Mashpee I, the Plaintiffs, claiming to be members-descendents of the Mashpee Tribe, brought an action against virtually the same Defendants as are named in the instant action. They claimed the Defendants authorized the alienation of the same land at issue in this case in contravention of the Indian Nonintercourse Act, the same Act which forms one of the grounds for the Plaintiffs' instant case. The Court dismissed Mashpee I on the merits. Therefore, since the basic conditions of res judicata are satisfied, the Plaintiffs are now estopped from relitigating these claims in the instant case. See Restatement (Second) of

Judgments §19; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979). The fact that we are presented here with an indian land claim presents no reason to depart from this fundamental rule of repose. As this Court only recently observed, in cases where the Plaintiff seeks to relitigate questions which affect title to land, the notions of finality and res judicata are "at their zenith" and, when once decided, should be considered no longer subject to change. Nevada v. United States, ___ U.S.____, 103 S. Ct. 2906, 2918 n. 10 (1983).

There is little merit to the Plaintiffs' argument that the decision in Mashpee I was a decision as to jurisdictional standing and not on the merits. It is abundantly clear that the Plaintiffs in Mashpee I sufficently

asserted an actual injury as a direct result of alleged illegal conduct, that the injury was allegedly caused by the acts of the Defendants, and that it was likely to be redressed by a favorable decision of the Court, thereby overcoming the jurisdictional barrier of standing. See Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-472 (1982). After forty (40) days of a trial in which the Plaintiffs failed to establish tribal existence, a critical element of its prima facia case, the Court in Mashpee I was quite specific in ordering "that this action be DISMISSED on the merits, the Plaintiff not having established its standing to bring suit as an Indian

tribe. (emphasis supplied) See Mashpee I, 447 F.Supp. at 950[4/]

The Plaintiffs argue that res judicata is not a bar to the instant action because in the present case, unlike Mashpee I, the claims of individual Indians are asserted. The doctrine of res judicata bars a suit by not only actual parties but also those whose interests are in privity with them. See Montana v. United States, 440 U.S. 147, 153-54 (1979). This Court should not tarry long in deciding whether individual members of a tribe are in privity with that tribe regarding actions brought on behalf of the alleged tribe as a whole.

4/ The fact that the case went to trial for forty (40) days in and of itself is persuasive in rebutting the Plaintiffs' twin assertions that the decision in Mashpee I was not on the merits and that it was not based on a fair process.

Apart from the above analysis the Plaintiffs' claims are barred by the doctrine of collateral estoppel. Since the Plaintiffs in the instant case had a full and fair opportunity to prove their tribal status under the Nonintercourse Act in Mashpee I, they are now barred from relitigating this issue on the basis of collateral estoppel. Since the proof of tribal status is an essential element in the case at bar, the Plaintiffs' claim must fail and the action was properly dismissed.

Individual indian claims must fail for an additional reason. The individual Plaintiffs assert they have independent claims under the Non-intercourse Act. When the District Court articulated in its detailed review

of the statutory history of the Act,[5] it correctly determined that the Act supported only causes of action brought by an indian "nation or tribe" and not by individual indians. Prior judicial opinions hold the same. Epps v. Andrus, 611 F.2d 915 (1st Cir. 1979); Joint Tribal Council of the Passamaqoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975). There is no reason for this Court to review those decisions in this case not only because they are correct, but also because principles of finality of judgment will prevent the Court from ever reaching this argument on the merits.

5/ See Mashpee II, 542 F.Supp. at 803-06.

CONCLUSION

The Petitioners' application for a Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: November 14, 1983

Office - Supreme Court, U.S.
FILED
NOV 23 1983
ALEXANDER L. STEVAS

No. 83-624

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

MASHPEE TRIBE, ET AL.,
PETITIONERS,

v.

JAMES G. WATT, ET AL.,
RESPONDENTS.

Brief of Respondent Town of Mashpee in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Counterstatement of Question Presented for Review.

Whether the court of appeals properly affirmed the dismissal of an action commenced by plaintiffs who four years earlier had asserted the same claims to the same land against the same defendants and whose claims in that prior action were dismissed by entry of a final judgment on the merits?

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Mashpee Trible v. Watt, 542 F. Supp. 797 (D. Mass. 1982), aff'd, 707 F.2d 23 (1st Cir. 1983) ("Mashpee II") 1, 4, 5, 7, 8

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No. 83-624.

In the

Supreme Court of the United States.

OCTOBER TERM, 1983.

MASHPEE TRIBE, ET AL.,
PETITIONERS,

v.

JAMES G. WATT, ET AL.,
RESPONDENTS.

Brief of Respondent Town of Mashpee in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions and Judgments Below.

The opinion of the United States Court of Appeals for the First Circuit which is the subject of the petition is reported at 707 F.2d 23 (1st Cir. 1983). That decision affirmed a decision of the United States District Court for the District of Massachusetts reported at 542 F. Supp. 797 (D. Mass. 1982).

An earlier, but related, opinion and judgment of the United States Court of Appeals for the First Circuit is reported at 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979). That decision affirmed a judgment of the United States District Court for the District of Massachusetts reported at 447 F. Supp. 940 (D. Mass. 1978).

Jurisdiction.

The order of the United States Court of Appeals for the First Circuit affirming the judgment of the district court was entered on May 23, 1983. On August 8, 1983, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 20, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Counterstatement of the Case.

On August 26, 1976, the petitioner, the alleged Mashpee Tribe ("the petitioner"),[1] commenced an action in the United States District Court for the District of Massachusetts claiming title to essentially all of the land in the Town of Mashpee, Massachusetts, and a small portion of land in the adjoining Town of Sandwich, Massachusetts. The petitioner alleged that the Commonwealth of Massachusetts had authorized the alienation of the claimed land by the petitioner's predecessors in contravention of § 12 of the Indian Trade and Intercourse Act of 1834, now codified in part as 25 U.S.C. § 177 ("the Nonintercourse Act"); and that, consequently, the petitioner was entitled to immediate possession of that land and trespass damages.

Specifically, the petitioner contended that, in 1685, the General Court of the Plymouth Colony granted the claimed land to the petitioner's predecessor in interest subject to a restraint on alienation. *Mashpee Tribe* v. *Town of Mashpee*, 447 F. Supp. 940, 949 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.),

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[1] As used here, the word "petitioner" will refer collectively to the alleged Mashpee Tribe and its claimed members.

cert. denied, 444 U.S. 866 (1979) ("*Mashpee I*"). In 1723, this land and its residents were organized as a propriety and, in 1834, as the District of Mashpee. 447 F. Supp. at 944-945. In both its propriety and district forms, the land in Mashpee remained subject to restraints on alienation imposed by the Plymouth Colony and later by the Massachusetts General Court. 447 F. Supp. at 945-946. In 1842, the Massachusetts General Court partitioned and alloted the land in the district to the individual residents subject again, however, to a continued restraint on alienation to non-residents. 447 F. Supp. at 945. In 1869 and 1870, the Massachusetts General Court eliminated its restraint on the conveyance of the previously allotted land to non-residents of Mashpee and incorporated Mashpee as a town. It is these 1869 and 1870 legislative acts which the petitioner asserted violated the Nonintercourse Act.

Mashpee I was submitted to a jury after forty days of trial on the issue whether the petitioner and its claimed predecessors were an Indian tribe within the meaning of the Nonintercourse Act on the date *Mashpee I* was commenced and on certain other relevant dates. The jury found as a matter of fact that the group was an Indian tribe on March 31, 1834, when the District of Mashpee was established, and on March 3, 1842, the date on which there was a formal partition of land in the District. However, the jury found that the group was not an Indian tribe on July 22, 1790, the date of the enactment of the first version of the Nonintercourse Act; on June 23, 1869, the date on which the Massachusetts General Court removed all restraints on the alienation of Indian land in Massachusetts; on May 28, 1870, the date on which the Town of Mashpee was incorporated; and, on August 26, 1976, the date of commencement of *Mashpee I*. 447 F. Supp. at 943. Based upon the jury's special verdicts, the *Mashpee I* court found that the petitioner had not established the tribal status element of a Nonintercourse Act claim, and dismissed the petitioner's claim on

the merits. On appeal, the United States Court of Appeals for the First Circuit affirmed. *Mashpee Tribe* v. *New Seabury Corp.*, *supra*. On October 1, 1979, this Court denied the petitioner's first petition for a writ of certiorari. 444 U.S. 866 (1979).

On December 18, 1981, the petitioner commenced a second action, again challenging the alienation of the claimed land subsequent to the 1869 and 1870 legislative acts of the Commonwealth of Massachusetts.[2] Because *Mashpee I* had conclusively determined that the petitioner's claimed predecessors were not an Indian tribe in 1869 or 1870, that the petitioner had not been an Indian tribe on the date *Mashpee I* was commenced and, consequently, that the petitioner could not state a claim under the Nonintercourse Act, the respondent Town of Mashpee moved to dismiss this second action on the basis of the doctrines of res judicata and collateral estoppel. The respondent also moved to dismiss the claims of the individual plaintiffs for failure to state a claim upon which relief could be granted.

On June 30, 1982, the district court dismissed the second action against all defendants except certain United States officials. *Mashpee Tribe* v. *Watt*, 542 F. Supp. 797 (D. Mass. 1982) ("*Mashpee II*") (Pet. App. B). The petitioner again appealed to the United States Court of Appeals for the First Circuit. On May 23, 1983, that court affirmed, specifically holding that "this effort to relitigate the tribe's claim is barred by elementary principles of res judicata." *Mashpee Tribe* v. *Watt*, 707 F.2d 23, 24 (1st Cir. 1983) (Pet. App. A).

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[2] The petitioner now suggests that it also alleged the 1842 act of the Massachusetts General Court to be violative of the Nonintercourse Act (Pet. 3). Before the lower courts, however, the petitioner challenged only the 1869 and 1870 legislative acts. *Mashpee Tribe* v. *Watt*, *supra*, 542 F. Supp. at 799 n.2.

After *Mashpee II* had been dismissed by the district court but while the petitioner's appeal of that decision was pending before the court of appeals, the petitioner filed in *Mashpee I* a "Motion to Vacate Judgment and to Enter Substitute Judgment Nunc Pro Tunc." By that motion, the petitioner sought to vacate the 1979 judgment of the court of appeals in *Mashpee I* and to substitute a judgment determining the petitioner to be an Indian tribe within the meaning of the Nonintercourse Act despite the jury findings. That motion and the supporting memorandum offered by the petitioner were considered by the same panel of judges of the court of appeals which had decided *Mashpee I*. After reviewing the motion and memorandum, the court of appeals denied the motion on the grounds that there was "no justification for recalling mandate and reconsidering these cases." On October 3, 1983, this Court denied the petitioner's second petition for writ of certiorari. *Mashpee Tribe* v. *New Seabury Corp.*, ____ U.S. ____, 52 U.S.L.W. 3249 (1983).

Summary of Argument.

The decisions of the court of appeals and the district court dismissing the petitioner's effort to relitigate claims which were dismissed four years earlier by entry of a final judgment on the merits do not conflict with any decision of this Court, any other court of appeals or any state court of final resort. The challenged decisions specifically do not conflict with any decision of this Court holding that only a judgment on the merits will bar a subsequent action, or any decision of this Court defining the parties to whom and the claims to which the doctrines of res judicata and collateral estoppel apply. Nor do the decisions below ignore or conflict with any executive

branch action. Instead, those decisions merely apply elementary principles of res judicata to the particular facts of this case and, therefore, do not raise issues sufficiently profound to justify review by certiorari.

Argument.

The Dismissal of the Petitioner's Effort to Relitigate its Previously Rejected Claims Raises No Issues of Importance Beyond this Case and Therefore does Not Warrant Review by Certiorari.

The challenged decision of the court of appeals does not conflict with any decision of this Court, Sup. Ct. R. 17.1(c); conflict with any decision of a state court of last resort, Sup. Ct. R. 17.1(a); or result in a conflict among the courts of appeals, Sup. Ct. R. 17.1(a). It does not decide any important issue of statutory or constitutional law not previously settled by this Court or involve any crucial procedural question. Nor does the record even remotely indicate that the court of appeals has so far departed from "the accepted and usual course of judicial proceedings . . . as to call for exercise of this Court's power of supervision." *Id.*

Instead, the decision in issue merely applies long and well established principles of res judicata. Rather than raising issues sufficiently profound and far reaching to justify review by certiorari, the petitioner's contentions represent no more than a litigant's dissatisfaction with prior judgments which were the result of extended and thorough litigation, which were correct when rendered and are correct today, and which twice have been the subject of unsuccessful petitions for certiorari. This petition thus raises no question of importance

beyond the factual context of this case but, rather, merely quarrels with the unwillingness of the court of appeals to reopen issues and arguments already finally resolved.

In its effort to create some colorable basis for issuance of a writ of certiorari, the petitioner makes four arguments. First, it contends that the court of appeals' dismissal of *Mashpee II* somehow conflicts with decisions of this Court holding that only a judgment on the merits will bar a subsequent action (Pet. 6-7, citing and relying upon *Hughes* v. *United States*, 71 U.S. (4 Wall.) 232 (1866); *Costello* v. *United States*, 365 U.S. 265 (1961); *Flast* v. *Cohen*, 392 U.S. 83 (1968); and *Warth* v. *Seldin*, 422 U.S. 490 (1975)). Second, the petitioner asserts that *Mashpee II* involves "more land, additional parties and new legal theories" (Pet. 10), and therefore concludes that the decision of the court of appeals conflicts with decisions of this Court and other courts defining the doctrines of res judicata and collateral estoppel (Pet. 9-11, 13). Third, the petitioner asserts that the court of appeals' dismissal on the grounds of res judicata conflicts with a decision of this Court authorizing relitigation of claims (Pet. 11, citing *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982)). Finally, the petitioner appears to contend that the court of appeals' decision ignores executive branch action affording the petitioner "nonterminated, politically recognized federal" Indian status (Pet. 7-9). None of these four arguments has merit.

A. *Because the District Court Dismissed* Mashpee I *on the Merits of the Claim and Not for Lack of Standing, There is No Conflict Between* Mashpee II *and Any Decision of This Court.*

The petitioner argues that the decision below conflicts with decisions of this Court holding that a dismissal for lack of standing is not on the merits. Specifically, the petitioner con-

tends that *Mashpee I* was dismissed for lack of standing and therefore concludes that the *Mashpee II* courts erroneously held that the doctrines of res judicata and collateral estoppel barred the present claims. Because *Mashpee I* was dismissed not for lack of standing but on the merits of the claim, the petitioner's argument is misplaced.

The petitioner bases its argument on the language of the district court's order in *Mashpee I* "that this action be DISMISSED on the merits, the plaintiff not having established its standing to bring suit as an Indian tribe." 447 F. Supp. at 950. The petitioner chooses simultaneously to focus on the word "standing" in the court's order and to disregard the court's designation of the dismissal as being "on the merits." By wrenching the language of the dismissal order out of context, the petitioner entirely misconstrues the nature of the holding in *Mashpee I* and the subtle but definite distinction between the constitutional and prudential doctrine of standing and tribal status as an element of a cause of action under the Nonintercourse Act.

The doctrine of standing, as recently defined by this Court, "subsumes a blend of constitutional requirements and prudential considerations." *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). The district court in *Mashpee I* was not concerned with the doctrine of standing, either in its constitutional or prudential dimension, and no discussion of the doctrine can be found in any *Mashpee I* opinion. It was clear beyond dispute in *Mashpee I* that the complaint asserted an actual injury as a direct result of allegedly illegal conduct, that the injury could fairly be traced to the challenged actions of the Massachusetts Legislature, and that it was likely to be redressed by a favorable decision. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State*, *supra*, 454 U.S. at 472. It was also clear that the peti-

tioner, which alleged it was the Mashpee Tribe, was attempting to assert its own rights and not the rights of a third party, that the dispute was not an abstract question or generalized grievance, and that the complaint's allegations of invalid conveyances of tribal land fell within the zone of interests protected by the Nonintercourse Act. *See id.*, 454 U.S. at 474.

Because standing was not in issue, the district court in *Mashpee I* proceeded directly to a determination of the merits of the Nonintercourse Act claim. It did so in two steps. First, the court addressed a motion to dismiss for failure to state a claim. *See Mashpee Tribe* v. *New Seabury Corp.*, 427 F. Supp. 899 (D. Mass. 1977). The defendant Town of Mashpee argued in that motion that the petitioner had inadequately alleged tribal status because it had not alleged federal recognition as a tribe. The court, citing *Narragansett Tribe of Indians* v. *Southern R.I. Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976) set forth "[t]he elements of a prima facie case" under the Nonintercourse Act:

> . . . plaintiff must show that:
>
> 1) it is or represents an Indian "tribe" within the meaning of the Act;
>
> 2) the parcels of land at issue herein are covered by the Act as tribal land;
>
> 3) the United States has never consented to the alienation of the tribal land;
>
> 4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.

427 F. Supp. at 902. The district court held at that juncture in the proceedings that the complaint stated a claim under the Nonintercourse Act because federal recognition was not essen-

tial to establish the first element of a cause of action under the Act. *Id.* The court concluded: "The Tribe has then sufficiently alleged its status. Whether it meets the criteria for protection under the Nonintercourse Act is a question of fact which is susceptible of proof like any other." 427 F. Supp. at 903.

In keeping with its focus on the elements of a claim under the Nonintercourse Act, and again without reference to the constitutional or prudential doctrine of standing, the district court conducted a jury trial on the merits to determine whether the petitioner could satisfy the first element of its prima facie case. After forty days of trial, the jury rendered a verdict concluding that the petitioner did not constitute a tribe within the meaning of the Act on certain crucial dates, including 1869 and 1870. 447 F. Supp. at 943. The defendants moved "for judgment of dismissal on the merits based on the jury's answer." *Id.* Explicitly relying on the jury's answers to the special interrogatories, the district court ordered "that this action be DISMISSED on the merits." 447 F. Supp. at 950. Without any reference to this Court's cases applying the constitutional or prudential doctrine of standing, the court of appeals affirmed the dismissal of *Mashpee I* on the merits. 592 F.2d at 579, 581.[3]

If the *Mashpee I* opinions left any doubt as to the grounds for that dismissal, the opinions of the district court and court of appeals in this case conclusively resolve such doubt. As the district court explained, the plaintiff in *Mashpee I* met both the three-prong test of Article III standing and the prudential test described above. 542 F. Supp. at 800 (Pet. App. B4).

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[3] Although the court of appeals, like the district court, used the word "standing," there is no indication in its opinion that it was using the word to describe the standing doctrine as a term of art. Rather, both courts appear to have used the phrase simply as a short-hand method of referring to the tribal status element of a cause of action under the Nonintercourse Act.

The court further clarified that it had dismissed *Mashpee I* not for lack of standing, but because the *Mashpee I* plaintiff failed to establish an element of its substantive claim. *Id.* The *Mashpee II* court of appeals agreed. 707 F.2d at 24 (Pet. App. A2).

Because the *Mashpee I* decision was on the merits of the petitioner's Nonintercourse Act claim, it does not conflict with this Court's cases denying res judicata effect to claims not dismissed on the merits. The very passage upon which the petitioner relies explains that standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968) (Pet. 7). The issue adjudicated in *Mashpee I* as an element of the petitioner's claim on the merits was petitioner's continuous tribal status. Because the district court and court of appeals have determined unequivocally that *Mashpee I* was decided on the merits, there is no possible conflict with any decision of this Court.

B. *Because the Individual Plaintiffs in* Mashpee II *Were in Privity with the Plaintiff in* Mashpee I, *the Decisions Below do Not Conflict with Any Decision of this Court.*

The petitioner argues that the doctrines of res judicata and collateral estoppel should not have been applied to bar the claims of the individual plaintiffs in *Mashpee II* because they were not formally named as parties in *Mashpee I*. Because the individual plaintiffs in *Mashpee II* participated in *Mashpee I*, have interests identical to the *Mashpee I* plaintiff and assert identical legal claims, their individual claims also are barred by res judicata and the decisions below so holding are entirely consistent with the decisions of this Court.[4]

---

[4] The petitioner also argues that res judicata should not bar its claims because this case involves additional defendants, land and legal theories. As

The court of appeals held that "the interests of the tribe and its members were fully and fairly represented." 707 F.2d at 24 (Pet. App. A2). It thus expressly adhered to this Court's statement in *Hansberry* v. *Lee*, 311 U.S. 32, 41-43 (1940), that judgments are binding against persons not parties who have interests in common with the parties which were adequately represented in prior proceedings. Moreover, because the court of appeals held that the individual plaintiffs in *Mashpee II* were all in privity with the *Mashpee I* plaintiff, its holding was fully consistent with this Court's repeated definition of res judicata as a doctrine binding parties and their privies. *See, e.g., Nevada* v. *United States*, ____ U.S. ____, 51 U.S.L.W. 4974, 4980 (1983) ("a prior judgment will bar the 'parties' to the earlier lawsuit 'and those in privity with them,' from relitigating the cause of action") (citing *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1876)); *Montana* v. *United States*, 440 U.S. 147, 153 (1979) ("a final judgment on the merits bars further claims by parties or their privies based on the same cause of action"); *Hughes* v. *United States*, 71 U.S. (4 Wall.) 232 (1866).[5]

This Court appears to recognize at least three categories of privies bound by a prior judgment: those who control an action although not parties to it; those whose interests are represented by a party to the action; and successors in interest. *See Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 329 &

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this Court has repeatedly held, the doctrine of res judicata bars parties to a prior action from litigating in a subsequent action not only issues that actually were raised, but also issues that could have been raised in the prior suit based upon the same cause of action. *E.g., Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981); *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979) (dicta); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940).

[5]Indeed, the petitioner appears to concede that a prior judgment will operate against those in privity with parties to that litigation (Pet. 9 n.1).

n.19 (1955) (citing Restatement of Judgments § 83, comment a.) This Court has applied the second category in holding that an Indian tribe whose interests are represented by the United States in a prior proceeding is bound by the judgment in that proceeding, and that individual Indians are bound by a judgment in an action brought by the United States on their behalf. *Nevada* v. *United States*, *supra*, 51 U.S.L.W. at 4981; *Heckman* v. *United States*, 224 U.S. 413 (1912). It was entirely consistent with these holdings for the court of appeals to determine that the individual *Mashpee II* plaintiffs, who participated in and exercised control over the *Mashpee I* litigation, and whose interests were represented by the organization to which they all claimed to belong, were bound by the *Mashpee I* judgment.[6] *See also United States* v. *Kabinto*, 456 F.2d 1087 (9th Cir.), *cert. denied*, 409 U.S. 842 (1972) (individual Indians bound by judgment in prior proceeding brought by tribe.)[7]

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[6] By their own admission, the individual plaintiffs all are members of the organization which brought suit in *Mashpee I*. At least ten of the individual plaintiffs in the present action, including the claimed tribal leaders, participated as witnesses in the trial of *Mashpee I*. In addition, at least twenty-one of the present plaintiffs provided deposition testimony in *Mashpee I*. It is clear therefore, that the individual plaintiffs in the present action had notice of *Mashpee I*, were allowed to participate in, and thereby exercise control over, the earlier litigation, and allowed the association of which they claim to be members to represent their interests in that litigation.

[7] The petitioners claim that the decision of the court of appeals is inconsistent with this Court's holding in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971). In *Blonder-Tongue*, this Court simply affirmed the defensive use of collateral estoppel, and did not address the issue of what persons are privies bound by a prior judgment. In fact, in defining the doctrine of mutuality of estoppel, this Court in *Blonder-Tongue* recognized that collateral estoppel applies both to parties and their privies. 402 U.S. at 320. Thus, the court of appeals' holding in this case is entirely consistent with *Blonder-Tongue*.

C. *No Decision of this Court Authorizes Relitigation of the Petitioner's Dismissed Claims.*

The petitioner also contends that the decision of the court of appeals conflicts with "this Court's policy . . . permitting relitigation" when a party "can demonstrate [a] serious defect" in the earlier litigation (Pet. 11). For this extraordinary proposition the petitioner cites only *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461 (1982). In *Kremer*, this Court held that a federal court in an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, was required to give preclusive effect to a state court decision affirming a state administrative agency's rejection of an employment discrimination claim. In so holding, the Court specifically rejected a contention that the state proceedings were so "fundamentally flawed" that the doctrines of collateral estoppel and res judicata should not apply. *Id.* at 480. Rather than articulating a policy permitting multiple litigation of a single claim, the Court confirmed the well established principle that a party who has had a "full and fair opportunity" to litigate a claim is precluded from relitigation.

There can be little doubt that the petitioner had the opportunity to fully and fairly litigate its claims in *Mashpee I*. Discovery was extensive and the trial consumed more than forty days. After the district court ordered judgment for the defendants on the basis of the jury's verdicts, an appeal was taken to the First Circuit Court of Appeals and that court affirmed. Ultimately, this Court denied a petition for certiorari. Thus, the petitioner had ample opportunity to assert and fully litigate any theories or facts before three courts and its claims, as the court of appeals held in *Mashpee II*, were "fairly litigated." 707 F.2d at 24.

The petitioner offers two "procedural defects" in *Mashpee I* which, in its view, entitle it to another opportunity to litigate

its land claims. First, the petitioner argues that its trial counsel in *Mashpee I* erred in permitting the issue of tribal existence within the meaning of the Nonintercourse Act to be determined by a jury. This tactical decision "leads [petitioner] to question the quality of [its] legal representation in *Mashpee I*" (Pet. 11-12). This Court, however, recently has held in an analogous context that allegations by an Indian tribe of inadequate representation in a prior proceeding do not limit the preclusive effects of the doctrine of res judicata. *Nevada v. United States*, *supra*, 51 U.S.L.W. at 4983 n.16.

Second, the petitioner quotes, without any reference, an alleged statement by the *Mashpee I* district court and asserts that that quotation evidences a bias which fatally flawed *Mashpee I*. The absence of any transcript reference to the alleged statement is telling; indeed, the respondent has been unable to locate that quotation in any part of the *Mashpee I* record. In any event, the petitioner had ample opportunity to make these allegations in *Mashpee I* and, in fact, asserted its bias claims in the form of motions to disqualify before the district court and court of appeals in *Mashpee II*.[8] Both courts, after thoroughly examining the petitioner's factual allegations, rejected the petitioner's claims. Consequently, the petitioner's totally unsupported and twice rejected allegations of bias provide no basis for abandoning the preclusive effect of res judicata.

The present petition is no more than another in a series of attempts to circumvent the salutary doctrine of res judicata by attacking a judgment rendered four years ago. Both in its filing of *Mashpee II* and its efforts to vacate the judgment in *Mashpee I*, the petitioner has demonstrated a consistent disregard for the policies of finality and repose which are "essential

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[8] A memorandum and order of the First Circuit Court of Appeals dated September 8, 1982 rejecting the petitioner's claim of judicial bias is set forth as Appendix 1.

to the maintenance of social order." *Nevada* v. *United States*, *supra*, 51 U.S.L.W. at 4979 (quoting *Southern Pacific Railroad* v. *United States*, 168 U.S. 1, 49 (1897)). Those policies are of particular importance where, as here, the very pendency of the action calls into question the title of thousands of innocent landowners to thousands of acres of land. *Nevada* v. *United States*, *supra*, 51 U.S.L.W. at 4979 n.10 ("The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water"). These claims, now the subject of litigation for more than seven years, must once and for all be resolved with the denial of this third petition for a writ of certiorari.

D. *The Decision of the Court of Appeals Does Not Conflict with Any Pronouncement of the Executive or Legislative Branches.*

The petitioner repeatedly and disingenously alleges that it is an Indian tribe "federally recognized" by the executive and legislative departments of the United States (Pet. 3, 7-9, 10). This "federal recognition," the petitioner contends, is binding on the courts and in conflict with the decision of the court of appeals. As the petitioner is well aware, it has not qualified for federal recognition as an Indian tribe under the regulations promulgated by the Department of the Interior. 25 C.F.R. Part 54 (Procedures for Establishing That an American Indian Group Exists as an Indian Tribe). Nor has it been included on the official listing of tribal entities having a government to government relationship with the United States. 44 Fed. Reg. 7234-7237 (February 6, 1979). Indeed, in their answer in *Mashpee II*, the federal defendants, all from the executive branch, specifically stated "that the United States has never acknowledged the group as an Indian tribe." These unequivocal pronouncements of the executive branch that the petitioner

is not an Indian tribe for federal purposes are, of course, entitled to great weight. *United States* v. *Sandoval*, 231 U.S. 28, 47 (1913). More important, they do not conflict in any way with the decision of the court of appeals.

Conclusion.

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1562.

MASHPEE TRIBE, ET AL.,
Plaintiffs, Appellants,

v.

JAMES G. WATT, ET AL.,
Defendants, Appellees.

BEFORE COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

MEMORANDUM AND ORDER

Entered September 8, 1982

Plaintiffs, describing themselves as members-descendants of the Mashpee Tribe and seeking, inter alia, the recovery of possession of lands embracing the Town of Mashpee, have appealed from a constructive denial of preliminary injunctive relief. They seek various relief pending appeal including the disqualification of Judge Skinner from presiding in their action. We treat plaintiffs' various motions addressed to the disqualification issue as a petition for a writ of mandamus, *see In re United States*, 666 F.2d 690, 694 (1st Cir. 1981); *United States* v. *Parrilla Bonilla*, 626 F.2d 177, 179 n.2 (1st Cir. 1980)

(refusals to recuse reviewable via petition for writ of mandamus), and deny the petition.

As a preliminary matter, plaintiffs, relying on *Hampton* v. *Chicago*, 643 F.2d 478, 479 (7th Cir. 1981), seek to disqualify defendants from participating in any appellate proceedings addressed to Judge Skinner's disqualification. Since, unlike *Hampton*, we are not here concerned with the appealability of a district court's grant of a motion to recuse, we need not decide whether we would follow *Hampton*. Rather, in view of defendants' substantial res judicata and collateral estoppel defenses — defenses which Judge Skinner, who presided over the earlier 40 day trial, was in a position to evaluate more readily than would another judge — the present situation is more analogous to *In re Union Leader Corp.*, 292 F.2d 381 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961), where we concluded the party opposing disqualification had "an immediate and legitimate interest to protect" and permitted said party to participate. *Id.*, 384 n.4.

Relying on 28 U.S.C. § 455(a), 28 U.S.C. § 144, 28 U.S.C. § 47, and due process guaranties of fundamental fairness and an impartial tribunal, plaintiffs contend Judge Skinner erred in refusing to recuse himself from presiding in the present action.

Several affidavits were filed below in support of the recusal motion. The affidavits of plaintiffs' counsel, Attorney Hahn, alleged Judge Skinner "has a personal bias, prejudice and predisposition or appearance of same, against plaintiffs' view of the principal issues herein, and/or a personal bias, prejudice and predisposition or appearance of same in favor of the . . . non-Indians, and in favor of their view of the principal issues. . . ." As grounds for his belief, he referred to the following:

(a) Judge Skinner's statement, during a hearing on a motion to dismiss in the case of *Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979), to the effect that he under-

stood but disagreed with the Indian plaintiffs view of the law and therefore felt oral argument would not be fruitful;

(b) Judge Skinner's observation during the trial in *Mashpee Tribe* v. *Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979) (Mashpee I) of "one character who has his head shaved with only a scalp plate";

(c) a perceived difference in the handling of Indian and non-Indian potential jurors during the voir dire in *Mashpee I*;

(d) Judge Skinner's charge in *Mashpee I* concerning burden of proof and his remarks to counsel raising the constitutionality, under certain circumstances, of upsetting land transfers made 150 years ago;

(e) Judge Skinner's construction of 25 U.S.C. § 177 as requiring a tribe to "demonstrate a definable organization before it can qualify for the extraordinary remedy of the total voiding of land titles acquired in good faith and without fraud";

(f) Judge Skinner's understanding of the term "reservation," as manifested in his questioning of a *Mashpee I* witness, which understanding, plaintiffs say, is contrary to the Supreme Court's test of "Indian Country";

(g) a remark concerning Massachusetts' release of entailment in 1842;

(h) Judge Skinner's submission of the question of tribal existence to the jury in *Mashpee I*.

Chief Drifting Goose, a plaintiff, alleged by affidavit that Judge Skinner "has a personal bias, prejudice and predisposi-

tion or appearance of same, against me individually and as I represent all Indians and Tribes. . ." and as grounds therefore pointed, in addition to matters covered in the Hahn affidavit, to

(i) Judge Skinner's decision, adverse to the Indians, in *Mashpee I* and *Epps* v. *Andrus*;
(j) Judge Skinner's alleged remarks during *Mashpee I*, the "gist" of which, affiant says, was, "The ramifications are very strong here. To follow the law would be too harsh on the non-Indians living in Mashpee";
(k) a petition, signed by numerous persons who described themselves as "members of the Community of Mashpee (Tribe of Indians) of the Wampanoag Nation," complaining of Judge Skinner's filling the courtroom in *Mashpee I* with federal marshals, and stating they believed Judge Skinner was prejudiced;
(l) a petition from "members of the Aquinnah or Gay Head (Tribe of Indians)" calling for the recusal of Judge Skinner because of his prejudice against Indians.

Plaintiffs point to several further incidents occurring more recently which, they claim, indicate Judge Skinner should be disqualified:

(m) Judge Skinner's July 14, 1982 decision to schedule a July pre-trial conference in this and other Indian land cases when in February Judge Skinner had indicated he would stay further proceedings until the recusal issue had been resolved on appeal;
(n) various of Judge Skinner's comments which plaintiffs claim embody legal errors.

A. *28 U.S.C. § 455(a)*[1]

The standard of disqualification under 28 U.S.C. § 455(a) is an objective one: "Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in [§ 455(a)] should be read to warrant transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial." *United States* v. *Cowden*, 545 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977), *quoting from* H. Rep. No. 1453, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 6351, 6355 (emphasis in original). The proper test is "whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion . . . but rather in the mind of the reasonable," objective, and knowledgeable person. *United States* v. *Cowden*, 545 F.2d at 265; *In re United States*, 666 F.2d 690, 694, 695 (1st Cir. 1981) (situation to be viewed through eyes of objective and knowledgeable person). Thus, the fact that many Indians, as evidenced by the petitions filed, may sincerely believe Judge Skinner is biased is not sufficient to require recusal. *Cf. In re United States*, 666 F.2d at 694-695 (that a number of persons or the media have called for recusal is not enough).

To the extent plaintiffs' complaint is that Judge Skinner interprets the law differently from them or that he has participated in cases raising related issues or involving the same parties, plaintiffs have not stated a sufficient basis for disqualification. *United States* v. *Cepeda Penes*, 577 F.2d 754, 758 (1st Cir. 1978) (mere disagreement over the state of the law on

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[1] 28 U.S.C. § 455(a) reads, in material part,

"Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

any given point is not a ground for disqualification); *United States* v. *Cowden*, 545 F.2d at 265-266 (judge who has presided in a related or companion case not required to withdraw). While plaintiffs disagree with rulings made during and the result reached in *Mashpee I* and *Epps*, the judgments in both were affirmed on appeal, see *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979); *Epps* v. *Andrus*, 611 F.2d 915 (1st Cir. 1979), and, though plaintiffs have isolated from their context a number of statements Judge Skinner has made, plaintiffs have not shown he has purposely disregarded clearly settled legal principles brought to his attention.

None of Judge Skinner's complained of statements, conduct, or rulings demonstrate a personal animus or bias. That Judge Skinner noticed a head shaven but for a scalp plate — a hairstyle not commonly encountered in courtrooms today — denotes no prejudice. That he failed to disqualify a non-Indian juror who at one point expressed doubts about her ability to be impartial but later stated she felt she would base her decision on the evidence, but disqualified an "Indian" juror (a juror whose great grandfather was a Penobscot) who had discussed the matter with relatives and who responded during voir dire that her relationship "possibly" would effect her ability to be impartial does not establish bias. As Judge Skinner explained, his decision was not based merely on the words the jurors used, but on their whole demeanor.[2] Depending on the intonation, the word "possibly" can express a range of likelihood from remote to near certainty, and these

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[2] The analysis of the allegations made in the affidavits of bias is committed in the first instance to the trial court. *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981). Here, Judge Skinner indicated the non-Indian juror had nodded her head, apparently in a positive manner, while responding to the judge's query concerning her partiality. Plaintiffs' counsel did not dispute the judge's recollection of the juror's demeanor.

intonations are not beyond the trial court's evaluation. Nor does the presence of marshals during such a highly publicized trial as *Mashpee I* indicate a bias in favor of or against any party.

B. *28 U.S.C. § 144*[3]

Under 28 U.S.C. § 144, bias, to be disqualifying, must be personal and stem from an extrajudicial source. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *United States* v. *Serrano*, 607 F.2d 1145, 1150 (5th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980). Here, Judge Skinner's complained of statements and actions arose out of judicial proceedings, and none are indicative of bias.

C. *28 U.S.C. § 47*[4]

This statute is irrelevant.

D. *Due Process*

As plaintiffs' allegations give rise to no reason to believe Judge Skinner is biased or that he will fail to apply the law regardless what his personal views of the wisdom of the applicable law may be, plaintiffs' invocation of due process concepts

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[3] 28 U.S.C. § 144 reads

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists . . . [and] shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

[4] 28 U.S.C. § 47 reads

> "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

of an impartial tribunal and fundamental fairness, *see, e.g., Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980), adds nothing, in the circumstances of this case, to plaintiffs' statutorily based recusal claims.

Consequently, we find no error in Judge Skinner's refusal to recuse himself, and we deny plaintiffs' motion to stay further proceedings in the district court.

We deal briefly with plaintiffs' other requests for relief pending appeal. As for plaintiffs' motion for preliminary injunctive relief pending appeal, plaintiffs have demonstrated neither a sufficient likelihood of irreparable harm, contrast *Coalition for Basic Human Needs* v. *King*, 654 F.2d 838 (1st Cir. 1981), nor a sufficient likelihood of prevailing on the merits, *see Conservation Law Foundation of New England Inc.* v. *Andrus*, 617 F.2d 296, 298 (1st Cir. 1979), to warrant the sweeping interim injunctive relief sought. Nor is there an adequate basis for granting plaintiffs' motion pending appeal to disqualify counsel from appearing on behalf of the Town of Mashpee or the county defendants. The Town has the power to employ legal counsel. Mass. G.L. c. 40, § 5 (16A), and cases on which plaintiffs rely such as *Piccirilli Bros.* v. *Lewis*, 282 Pa. 328, 127 A. 832 (1925); *Wade* v. *Mississippi Cooperative Extension Service*, 392 F. Supp. 229 (N.D. Miss. 1975); *Secretary of Administration and Finance* v. *Attorney General*, 367 Mass. 154, 326 N.E.2d 334 (1975); and *Darling Apartment Co.* v. *Springer*, 25 Del. Ch. 420, 22 A.2d 397 (1941); where the respective state attorney generals — the persons in whom control of state litigation was vested — opposed private representation of state agencies or officials are inapposite.

Remaining is the motion filed by certain nonparties requesting this court summarily to deny the "Plaintiffs, Appellants Motion Pending Appeal for Preliminary Restraining Orders, Disqualification of Hon. W.J. Skinner, and Disqualification of Certain Counsel." As we have denied all of plaintiffs' re-

quested relief, we need not determine whether the nonparties have standing to move for summary disposition.

Plaintiffs' motions for injunctive relief, to disqualify Judge Skinner, to disqualify counsel, and to stay district court proceedings are denied.

By the Court:

/s/ Dana H. Gallup
Clerk.

Office - Supreme Court, U.S.
FILED
DEC 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-624

In the Supreme Court of the United States

OCTOBER TERM, 1983

MASHPEE TRIBE, ET AL.
PETITIONERS

v.

JAMES G. WATT, ET AL.
RESPONDENTS

Reply Brief for Petitioners

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No. 83-624

In the Supreme Court of the United States

OCTOBER TERM, 1983

MASHPEE TRIBE, ET AL.
PETITIONERS

v.

JAMES G. WATT, ET AL.
RESPONDENTS

Reply Brief for Petitioners

Introduction

Inasmuch as petitioners believe respondents' opposition briefs contain a number of fundamental legal and factual errors, petitioners will briefly reply to several of respondents' arguments.

Argument

I. RESPONDENTS' ARGUMENT THAT DOUBTS MAY BE RESOLVED IN FAVOR OF PRECLUSION DIRECTLY CONFLICTS WITH THIS COURT'S *RUSSELL V. PLACE* DECISION.

"The fundamental aspect of standing is that it *focuses on the party* seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (emphasis added).

All the *Mashpee I* defendants and courts did was to focus on the party plaintiff:

> "Plaintiff filed an action to recover land wrongfully alienated in violation of federal law, not an action to determine whether or not it was an Indian tribe. *Defendants chose to make a major issue of the determination of plaintiff's status as an Indian tribe.*" *Mashpee I Plaintiff's Reply Brief to the First Circuit*, 2 November 1978, p. 16 (emphasis added).

And the district court's dismissal was understood by the *Mashpee I* plaintiff as being for lack of standing:

> "But the trial court also held that the jury's special verdict as to plaintiff's present status meant that plaintiff lacked standing to seek a remedy for that violation. The trial court dismissed for lack of 'standing' . . . ." *Mashpee I Plaintiff's Brief to the First Circuit*, 31 August 1978, p. 6.

The First Circuit agreed with the trial court and upheld dismissal of *Mashpee I* at the "threshold" for lack of "standing". 592 F.2d at 579, 581, 589.

Interestingly, respondent Commonwealth argued in the district court that plaintiffs lacked standing:

> "The Commonwealth asserts that neither the tribal claim nor the claim as individuals brings the plaintiffs within the zone of interests protected by the Non-Intercourse Act and consequently plaintiffs have failed to establish the standing necessary to maintain this action." *State Defendants' District Court Memorandum in Support of Their Motion to Dismiss*, 5 April 1982, pp. 5-6.

Now, of course, the Commonwealth has changed its tune and argues that we are dealing with "merits" and not with "standing" (Com. Opp. Br. 9-11).

Finally, respondent Town admits both *Mashpee I* courts determined the *Mashpee I* plaintiff did not have standing to sue (Town Opp. Br. 10 n.3). And while the Town also admits

there is at least some doubt as to what was decided in *Mashpee I*, it declares that doubt has been resolved *in favor of preclusion* by the *Mashpee II* courts:

> "If the *Mashpee I* opinions left any doubt as to the grounds for that dismissal, the opinions of the district court and court of appeals in this case conclusively resolved such doubt." (Town Opp. Br. 10).

Respondent Town's argument as well as the *Mashpee II* courts' "resolution of doubt" flies in the face of this Court's holding that all doubts are to be resolved *against* preclusion. *Russell v. Place*, 94 U.S. (4 Otto.) 606, 610 (1876).

Respondents' emphasis of the *Mashpee I* district court's throw-in phrase "on the merits" is misplaced:

> "(W)e note at the outset that the court had already found that it had no jurisdiction over the action, so that it had no power to render a judgment on the merits against either party." *Dassinger v. South Central Bell Telephone Co.*, 505 F.2d 672, 674 (5th Cir. 1974).[1]

Respondents further contend that because *Mashpee I* was tried to a jury for forty days[2] the decision must have been "on the merits". However, this Court had held that standing dismissal may take place at any stage, even after a trial.[3] *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n. 31 (1979).

---

[1] Under *Russell v. Place*, the very fact the *Mashpee I* district court used the terms "merits" and "standing" in the same sentence raises a doubt which must be resolved *against* precluding a second action.

[2] Petitioners have argued the entire *Mashpee I* procedure was unprecedented and gross legal error. *See* Pet. generally.

[3] The purported jury trial itself was to determine standing, not merits: "The *threshold issue* of tribal existence was severed for separate trial by order of the court." *Mashpee I*, 447 F.Supp. at 943 (emphasis added).

II. RESPONDENTS' ARGUMENT THAT A FINDING OF "NO TRIBE" IN THE FIRST ACTION BINDS THE TRIBAL MEMBERS IN THE SECOND ACTION IS, AS ONE OF THE CIRCUIT JUDGES COMMENTED, A "BOOTSTRAP OPERATION".

Respondents argue that even though Mashpee I determined there was no tribe, the individual *Mashpee II* plaintiffs are bound by the prior judgment *against their tribe* (Com. Opp. Br. 12; Town Opp. Br. 13).

At the hearing below, one of the Circuit Judges referred to this argument as a "bootstrap operation". Nevertheless, the First Circuit later adopted this bootstrap argument without explanation when it stated "the interests of the tribe and its members were fully and fairly represented" (Pet. App. A2).

In all of respondents' cited cases (*see* Town Opp. Br. 13), there was no challenge to the Indian tribe's existence or standing.[4] Thus, presumably the courts determined the Indians' claims on the merits. For this reason, all of respondents' cases are inapposite.

Instant petitioners' situation is more nearly analagous to that of the Pueblo Indians at the turn of the century.

In *United States v. Joseph*, 94 U.S. 614 (1876), this Court, noting that the prior sovereign, Mexico, had made the Pueblo Indians of New Mexico citizens and had granted the Indians their lands in fee simple, held the Pueblos did not constitute Indian tribes under federal guardianship and their lands were not subject to federal alienation restriction.

But almost *four decades later*, *United States v. Sandoval*, 231 U.S. 28 (1913) overruled *Joseph* because statements by the territorial court there relied on "are at variance with other recognized sources of information, now available." 231 U.S. at 49. *Sandoval* held the Pueblos *were* federal Indian

[4] Respondent Town, who successfully challenged the *Mashpee I* plaintiff's standing to sue, is judicially estopped from taking advantage of cases where standing was not an issue and a judgment on the merits issued. *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982).

tribes and their lands *were* subject to federal alienation restriction.

Instant petitioners now, are in much the same position as the Pueblos were after *Joseph*.

Because of the *Mashpee I* defendants' uncontested jury demand (Pet. 11-12), and because crucial federal and state documentation establishing petitioners' status as a matter of law was never considered by a federal judge (Pet. App. D), petitioners believe their tribe and their lands have been denied the federal protection they are entitled to as a matter of law.

If in *Sandoval*, this Court was willing to consider "other recognized sources of information" not brought to its attention in *Joseph* and overrule after a forty year lapse, there was absolutely no reason the lower courts should not have examined instant petitioners' new bases for standing two years after *Mashpee I* was dismissed. In fact, the *Joseph* Court likened the Pueblos' condition to that of northeastern Indians such as the Senecas and Oneidas of New York. 94 U.S. at 617. Just as the Pueblos were under Mexico's guardianship and held their lands subject to sovereign alienation restriction before entering the Union, so the New York and Massachusetts tribes were under first Crown then State guardianship with sovereign alienation restriction on their lands when the United States Constitution became operable on March 4, 1789.[5] So if the Pueblos are federally protected, instant petitioners are likewise entitled:

> "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over *all dependent Indian communities* within its borders, whether *within its original territory* or ter-

[5] The extent of state power over Indian affairs even during the Confederation period has been questioned. *See Oneida Indian Nation v. New York*, 691 F.2d 1070 (2nd Cir. 1982).

ritory subsequently acquired, and whether within or without the limits of a State." *United States v. Sandoval*, 231 U.S. at 45-46 (emphasis added).

Accordingly, petitioners do not believe this Court should allow the First Circuit to doom the Mashpees to oblivion by refusing to allow the Indians to cure their standing problem.

III. The Mashpee Tribe Is a Politically Recognized, Non-Terminated Federal Tribe and Respondents Are Estopped from Denying Its Existence.

Respondent Town, pointing to the federal defendants' denial of "acknowledgment", disputes the fact that the Mashpee Tribe is federally recognized (Opp. Br. 16).

To begin with, the federal documents included in "Appendix D" to instant petition show the Mashpee Tribe not only was officially listed by the Bureau of Indian Affairs (BIA) and its predecessors as an Indian tribe of the United States, but also was repeatedly recognized by respondent Commonwealth of Massachusetts. And as the federal government recently admitted, neither the Mashpee Tribe nor its Reservation have ever been federally terminated (Pet. App. D-2). Thus, the Tribe has every right to be on the current BIA list.[6]

Such a situation, however, is not without precedent. In *City of Saulte Ste. Marie v. Andrus*, 532 F. Supp. 157 (D.D.C. 1980), it was pointed out that because of "earlier [BIA] errors and omissions" the Chippewa Tribe, which should have been federally recognized in 1934, was overlooked. But the court, after discussing Chippewa history including federal recognition during the 1800s, held the Secretary of the Interior acted properly when in 1972 he subsequently recognized the Chippewas.

In short, the current official BIA list is not etched in stone and the Mashpees' present predicament is akin to that of the Chippewas in *City of Saulte Ste. Marie v. Andrus, supra.*

[6] Most of the tribes listed along with the Mashpees on the older lists are included on the current BIA list. *Compare* Pet. App. D with 44 Fed. Reg. 7234-37 (February 6, 1979).

Further, insofar as the federal government, the Commonwealth and those claiming under the State argue the Mashpees are not a tribe, they are absolutely estopped from doing so.

In *Larson v. Valente*, 456 U.S. 228, 239-241 (1982), the state, which had acknowledged an entity's existence, attempted to deny existence during litigation. This Court held the state was absolutely estopped from following this course of double-dealing. The same rationale applies in the instant case.

IV. Respondent Commonwealth of Massachusetts, Not a Party in the First Case, Has Offered No Reason Why It Should Benefit from the Doctrine of Res Judicata.

Respondent Commonwealth baldly asserts *Mashpee II* was brought against "virtually the same defendants" as were involved in *Mashpee I* and therefore the First Circuit properly applied res judicata (Com. Opp. Br. 9).

As the Commonwealth knows full well, it was *not* a defendant in *Mashpee I*. Nor does the State argue it was in privity with any *Mashpee I* party. In fact, the *Mashpee I* defendants attempted to join the Commonwealth as a defendant but the State successfully opposed that motion. *See Mashpee I*, 427 F. Supp. 899, 904 (D. Mass. 1977).

Thus, there was absolutely no justification for the First Circuit's unreasoned application of res judicata in favor of the Commonwealth (Pet. 9 n.1).[7]

---

[7] Petitioners' claims against the Commonwealth were dismissed by the district court without hearing or explanation. Though petitioners brought this fact to the First Circuit's attention, it was ignored along with the parties' 162 pages of briefing.

V. TWO WEEKS AFTER THE DISTRICT COURT DISMISSED THE INDIANS' CASE, IT ISSUED A MEMORANDUM CONTRADICTING ITS PUBLISHED OPINION.

Before the district court, petitioners argued all post-1789 Massachusetts legislation affecting the Mashpee Indian Reservation is unconstitutional under the Commerce and Treaty Clauses, the federal Indian common law, the Non-intercourse Act and the Supremacy Clause. However, the district judge, as an integral part of his discussion on individual Indian rights, approved an 1842 Massachusetts Act which purported to individualize the Mashpee Reservation:

> "In 1842, the General Court of Massachusetts granted to the Indian Proprietors of Mashpee a limited title to up to 60 acres of previously allotted common land of the proprietorship.... Thus some Mashpee Indians did acquire individual title to land which had been held in aboriginal Indian title." *Mashpee II*, 542 F. Supp. at 804.

But just two weeks later, in a Memorandum to Counsel, the district judge contradicted himself and cast serious doubt on his earlier statement:

> "It is arguable that allotments to Mashpee tribal land made to individual Indians in 1842 were in violation of the Nonintercourse Act." *Memorandum to Counsel*, 14 July 1982.

Although petitioners brought this contradiction to the First Circuit's attention, the Court of Appeals refused to deal with it. Thus, petitioners strongly believe the First Circuit has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such departure by the district court, as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a).

Conclusion

For the reasons stated in the petition and this reply, petitioners believe this Court should grant their petition for certiorari and reverse the decisions below.

Respectfully submitted,

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OTION FILED
NOV 17 1983

No. 83-624

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

MASHPEE TRIBE, et al.
Petitioners

v.

JAMES G. WATT, et al.
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE CENTER FOR CONSTITUTIONAL RIGHTS, INDIAN LAW RESOURCE CENTER, NATIONAL LAWYERS GUILD IN SUPPORT OF GRANTING THE WRIT

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October 18, 1983

No. 83-624

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MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE

The Center for Constitutional Rights and other amici hereby respectfully move, pursuant to Rules 36.1 and 42(3) of the Court's Rules of Practice, for leave to file the attached brief as amici curiae in support of petitioner's effort to

obtain review of important procedural and substantive questions concerning the extent to which the Constitution and federal common law protect Indian land title.

This motion and the attached brief are timely filed within the time allowed for filing of respondents' brief on the petition for certiorari.

Amici curiae are Indian rights and civil liberties organizations, which have been involved in issues of the type presented in this case or which believe that denial of due process to Indians ultimately affects the rights of all people in the United States and that equitable application of the law is essential to protecting the rights of all people.

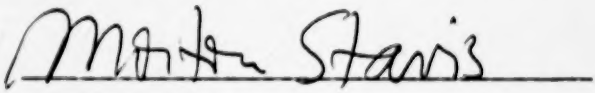
The proposed brief of amici addresses the need for granting the writ from a broad perspective, beyond that presented

by the parties. The proposed brief discusses the national significance of the issues presented and the need for this Court to affirm basic protections historically guaranteed to Indians by the Constitution and federal common law.

Amici believe that the courts below have ruled against petitioners on the basis of ungrounded and inconsistent standards that are wholly outside the framework fashioned by this Court for litigating Indian land title. Amici believe that the erroneous judgments below should be reversed, to permit petitioners their fundamental right to a "day in court."

Amici have requested the consent of the parties to appear. The petitioners have granted such consent, but to date the respondents have not. For the foregoing reasons, amici respectfully move

this Court for leave to file the attached brief amici curiae in support of granting the writ of certiorari.



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BRIEF ON BEHALF OF AMICI CURIAE CENTER FOR CONSTITUTIONAL RIGHTS, INDIAN LAW RESOURCE CENTER, NATIONAL LAWYERS GUILD

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October 18, 1983

STATEMENTS OF INTEREST OF AMICI CURIAE

Center for Constitutional Rights

The Center for Constitutional Rights was born out of the southern civil rights movement of the 1960's. Since that time it has developed legal theories in support of constitutional rights in many areas. In June, 1982, CCR joined as amicus curiae in Hopi Indian Tribe v. Block to support religious rights in the San Francisco Peaks. Other cases have included the Wounded Knee defendants and Leonard Peltier, South Dakota v. Means, and otner lawsuits.

Indian Law Resource Center

The Indian Law Resource Center assists Native Americans in protecting their legal rights, human rights, cultures and religions through a program of research, public education and legal assistance.

National Lawyers Guild

The National Lawyers Guild is a nationwide membership organization of 7,000 lawyers, legal workers, law students and jailhouse lawyers with 105 chapters throughout the United States. Since its founding in 1937, the Lawyers Guild has been dedicated to seeking social equality, freedom to dissent and human rights. The Guild has regularly appeared as amicus curiae in defense of civil liberties and treaty rights of Native people. It is in that context that the Guild supports petitioners in this case.

INTRODUCTION: SUMMARY DENIAL OF THE RIGHT TO LITIGATE FEDERAL COMMON LAW TITLE TO INDIAN LAND PRESENTS AN ISSUE OF NATIONAL IMPORTANCE REQUIRING THIS COURT'S ATTENTION.

Amici take the extraordinary step of moving for leave to appear at the

petition for certiorari stage of this litigation because we believe that a grave and irreparable injustice will occur if the lower courts' dismissals stand. Petitioners will be forever barred from litigating federal common law and Constitutional claims to their ancestral lands. These claims have never been litigated.

Amici believe that protection of Indian lands is integral to a long-standing national policy that recognizes the unique status of the indigenous population of this continent. Amici believe that protection of Indian lands is inextricably bound together with a continuing federal obligation to protect Indian cultures, institutions, and ways of life, expressed in a multitude of statutes and decisions.

Permanent loss of Wampanoag aborigi-

nal lands would indeed be an ironic and disgraceful ending to the history of these people who first welcomed the Pilgrims and made possible the English settlement of America. Doctrines of "standing" and res judicata have been inappropriately applied by the lower courts to deprive Indian petitioners of their "day in court." Amici argue that extinguishment of Indian land title, particularly by unilateral state action, should be sanctioned only after the Indians receive their "day in court," a full and fair adjudication of the merits of every legal issue.

Amici also argue that the federal common law and Constitutional issues petitioners seek to litigate present positions whose significance has long been recognized by this Court.

FACTS

Petitioners have existed on land they now inhabit and claim since time immemorial, and certainly since the time of first European contact with this continent.

Petitioners' first attempt to litigate their land claim, brought under the Nonintercourse Act, 25 U.S.C. § 177, was dismissed for lack of standing, pursuant to a jury decision on this issue. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), aff'd sub nom. Mashpee Tribe v. New Seabury Corp., 592 F. 2d 575 (1st Cir.), cert. denied, 444 U.S. 866 (1979) (Mashpee I).

Petitioners' instant suit, Mashpee Tribe v. Watt, 542 F. Supp. 797 (D. Mass. 1982), aff'd, 707 F.2d 23 (1st Cir. 1983) (Mashpee II), asking declaratory and injunctive relief under federal

Constitutional and common law, was dismissed below on grounds that Mashpee I is res judicata.

Petitioners challenge the unprecedented post hoc shifting by the courts below of the grounds of their decisions in Mashpee I from "standing" to "merits."

Petitioners challenge unilateral state action purportedly converting their tribe into a state town, thereby depriving petitioners of land and rights in common as tribal members.

ARGUMENT

I. EXTINGUISHMENT OF INDIAN TITLE, PARTICULARLY BY UNILATERAL STATE ACTION, SHOULD BE SANCTIONED ONLY AFTER FULL AND FAIR ADJUDICATION OF THE MERITS OF EVERY LEGAL CLAIM AVAILABLE TO THE INDIANS

Extinguishment of Indian title to land must occur within a context of fundamental fairness and due process.

Seminole Nation v. United States, 316 U.S. 286, 297 (1942); Indian Claims Commission, 60 Stat. 1049 (1946). This Court has recognized that the national policy of protecting Indian culture and institutions requires careful scrutiny of procedural rules, particularly where unilateral action purports to extinguish aboriginal rights.

The decisions below, applying the doctrines of "standing" and "res judicata" to prevent the Indian Petitioners from fully litigating their claim to ancestral lands, have denied them fundamental due process, and in so doing, violate fundamental federal principles governing Indian affairs.

This denial of fundamental fairness is exhibited by the deep confusion in the decisions below on the issue of "standing." Petitioners' first attempt

to litigate title to their land was dismissed by the District Court on the ground that Petitioners had "not . . . established its standing to bring suit . . ." Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 950 (D. Mass. 1978) (Mashpee I). In dismissing the Petitioners subsequent (and current) suit, the same District Court Judge held that "the plaintiff in Mashpee I had standing. . . ." 542 F. Supp. 707, 800 (D. Mass. 1982) (Mashpee II). On appeal of that decision, the First Circuit compounds the confusion by equating standing with "subject matter jurisdiction" holding that:

> the decision in the prior case rested on the tribe's inability to prove an essential element of its substantive claim, its continued tribal identity; the dismissal order therefore was a judgment on the merits rather than a dismissal for lack of subject matter jurisdiction. 707 F.2d 23, 24 (1st. Cir. 1983).

The confusion in the courts below may originate from the fundamental error in Mashpee I, namely, permitting a jury to determine the question of standing as a matter of fact, contrary to a long line of decisions holding that the question of Indian tribal existence is a matter of law. This Court stated explicitly in Wilbur v. United States, 281 U.S. 206, 221 (1930) that ". . . whether the tribe is still existing. . . (is a) question of law." In United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865),

> In reference to all matters of this kind, it is the rule of this Court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this Court must do the same.

In United States v. Boylan, 265 F. 165 (2d Cir. 1920), particularly relevant because the validity of the application

of state law to terminate Indian land rights is identical to the issues the Mashpee raise, the Second Circuit stated:

> Congress alone has the right to say when the guardianship over the Indians may cease. United States v. Nice, 241 U.S. 591, 36 Sup. Ct. 696, 60 L.Ed. 1192; Tiger v. Western Inv. Co., 221 U.S. 286, 31 Sup Ct. 578, 55 L.Ed. 738. Accordingly it has been held that it is for Congress to say when the tribal existence shall be deemed to have terminated, and Congress must so express its intent in relation thereto in clear terms. Id., at 171.

As a factual matter, Congress has never terminated the Mashpee nor any Wampanoag people, and the Court of Appeals may have been cognizant of the federal judicial policy of deferring to a coordinate branch of government political recognition, when it stated in Mashpee I that its decision was "narrow" and "technical." 592 F.2d at 587. Yet, in its affirmation of the dismissal of

Mashpee II, the instant case, the first circuit has failed to heed this fundamental Indian law doctrine, and, reversing itself, asserts that standing involves "an essential element of (Petitioner's) substantive claim." 707 F.2d at 24.

The policy of the Federal Government under the Articles of Confederation and the Constitution has been to protect Indian governments from the prejudices and misunderstandings of state and local governments; Worcester v. State of Georgia, 31 U.S. 515 (1832), and its progeny. This policy was violated when the courts below first dismissed the Petitioners' claims on the basis of a jury decision as to standing and later barred Petitioners' attempt to cure the alleged standing defect by converting the question of standing to a "decision on the merits" of the underlying land title

claim. [1]

Deep confusion also exists in the decisions below as to the application of res judicata. The District Court in Mashpee II characterized Mashpee I by stating that "The only question reached was whether the plaintiff constituted a tribe entitled to the protections of the (Non-Intercourse) Act." 542 F. Supp. at 799. That court also noted that "the plaintiff was given an opportunity to amend its complaint to state the claims

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[1] The logic of the jury decision itself raises the possibility that the failure to prove standing might be subsequently cured, since the jury decision was a finding that tribal existence was absent on specific dates although present on others. (See 592 F.2d at 579-580.) Presumably, if the Tribe can be found to have come into existence after a period of nonexistence, only to fall into non-existence once again, it may equally be found to have come again into existence on a subsequent date, a possibility foreclosed by treating the standing question as going to the "merits."

of its individual members, but it chose not to do so." Id. Despite these qualifications in the District Court's opinion, the Circuit Court, affirming the order of dismissal in Mashpee II, stated, "the interests of the tribe and its members were fully and fairly represented." 707 F.2d at 24. This assertion by the Circuit Court in Mashpee II is suspect and without foundation especially in view of its decision affirming the dismissal in Mashpee I that the case only involved a "technical issue," 592 F.2d at 587, and that "future cases" Id., at 588, would determine the more basic issues, presumably including the issue of aboriginal title and whether or not it has been extinguished.

There should not have been summary dismissal of petitioners' case even if they had not been specially protected

Indian litigants.

> Under general basic principles . . . a motion for summary judgment on the basis of a prior judgment should be denied . . . if there is a genuine issue of material fact . . . whether (the prior judgment) was on the merits. . . . 2 Moore's Federal Practice, §56.17(52).

Under the circumstances, and recognizing the significance of petitioners' status as Indians, the application of res judicata in the instant case is wholly inappropriate. The only issue even arguably litigated is the matter of standing under the 1790 Nonintercourse Act. Even if the issue of standing were not curable, it is not dispositive of the merits of the federal Constitutional and common law claims raised by Petitioners in their current attempt to vindicate Indian title.

While the District Court recognized the inherent fairness of a "flexible"

application of res judicata to Indian plaintiffs, it nevertheless applied the doctrine inflexibly. In reference to Petitioners' claims of protected Indian title under the Constitution and federal common law, the District Court incorrectly presumed that the determination of tribal existence under the Nonintercourse Act was applicable and dispositive of the standing issue under these other bases as well. "Since plaintiffs do not constitute a tribe, (the claim of inherent Indian sovereignty) is inapplicable." 542 F. Supp. at 806. The District Court's holding that standing is not a curable defect, coupled with the First Circuit's decision that a lack of standing is res judicata as to all the underlying title claims has precluded the Petitioners from having a full and fair adjuducation of their claims to the land

which is the subject of the suit. In sum, Indian title has been extinguished by unilateral state action without a trial on the merits.

II. THE DECISION BELOW IS IN CONFLICT WITH A RECENT DECISION IN THE FOURTH CIRCUIT

The First Circuit decision in this case is completely contrary to a recent decision in the Fourth Circuit. Catawba Indian Tribe of South Carolina v. State of South Carolina, Docket No. 82-1671, decided October 11, 1983. Review of Catawba underscores the harsh and unwarranted treatment the First Circuit has meted out to the Mashpee.

In Catawba, the Fourth Circuit reversed a District Court decision which had granted the state's motion for summary judgment (unreported decision, D.C. S.C., Columbia Div., Civ. No. 80-2050, June 14, 1982). The Circuit Court held

that the Catawba Termination Act, 25 U.S.C. §§ 931, et seq. (1959), did not preclude plaintiff's suit to recover lands under the Nonintercourse Act. The court stated that the termination act had no effect on plaintiff's land claims, neither extinguishing nor preserving them. The Fourth Circuit specifically held that the termination act did not make state law applicable to the tribe, nor did it end tribal existence.

Catawba acknowledges that Indian land rights are so fundamentally important in our federal scheme that they can be terminated only be explicit Congressional intention, which was not present in the 1959 act. In short, the Catawbas will finally have their "day in court."

Upon comparison of this decision with the Mashpee decisions in the First Circuit, the inequities become all too

apparent. In Catawba, substantive law is construed liberally to assure that the Indian claimants will have their "day in court," whereas in the Mashpee cases, procedural roadblocks have repeatedly been erected to preclude any discussion of the merits. This Court must resolve this conflict between Circuits in favor of the long-standing federal policy of solicitude toward Indian litigants.

III. PETITIONERS' CONSTITUTIONAL AND COMMON LAW CLAIMS PRESENT QUESTIONS OF RECOGNIZED SIGNIFICANCE TO THIS COURT

Petitioners present the most fundamental approach to matters of Indian land title since the great Cherokee Nation appeals to this Court 150 years ago. Petitioners' claims antedate the Revolution and the Constitution. They go to the heart of federal jurisdiction over Indian land cases, rooted in basic principles of international law and

sovereignty. As the United States Department of Justice stated in its amicus brief to this court in State of Connecticut v. Mohegan Tribe, 638 F.2d 612 (2d Cir. 1980), cert. denied. 452 U.S. 968 (1981):

> . . . quite independently of any statutory restraints, Indian tribes have long been held disabled from alienating their lands without the concurrence of the national sovereign, and any such attempted transaction is void as a matter of law, without reference to the Nonintercourse Acts. Thus, in this case, the respondent pleaded the ineffectiveness of any land sales under the Constitution, and no decision here of the statutory issue can affect that fundamental objection, not yet addressed by the courts below. Id., at 4-5.

This Court has repeatedly applied these principles, most recently in Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974), wherein was stated:

> The rudimentary propositions that Indian title is a matter of

federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States. . .but this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law. Id., at 670.

* * * *

"Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." Cramer v. United States, 261 U.S. 219, 227. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. 543, and has been repeatedly reaffirmed. (citations omitted) Id., at 668 (quoting United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941).

And furthermore,

a tribal right of occupancy, to be protected, need not be "based upon a treaty, statute, or other formal government action." Id., at 669 (quoting Santa Fe, supra).

In light of these oft-repeated prin-

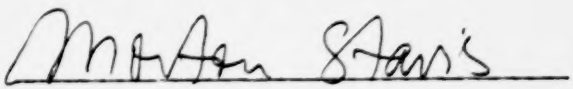
ciples, the disposition by the District Court of petitioners' claim under the Indian Commerce Clause ("Since there is no federal statute which protects plaintiffs here, preemption is not applicable." 542 F.Supp. at 806.) lacks any justifiable foundation.

The Mashpee, like the Oneida prior to this Courts' decision in 1974, have been blocked by jurisdictional doctrines inappropriately applied. The Mashpee, like the Oneida, have a right to present their claims. Failure of this Court to review and reverse the prior proceedings in this case would work a fundamental and irreparable injustice.

CONCLUSION

This is an important case which presents an issue of gross inequity to Indian litigants, and abuse of the rules of civil procedure. It is also an

appropriate case in which this Court may resolve a conflict between the Circuits regarding a fundamental principle of federal Indian law. The writ of certiorari ought to be granted.



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October 18, 1983